150 U.S. 76

RECORD, CASE NO. 15150.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., ~~1180~~. 821

ROBERT M. HALL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED SEPTEMBER 29, 1892.

that guano, used as manure, ought to be admitted free, than that sulphate of potash expressly brought in, and actually used, for that same purpose should be. The *object* of the statutes—the fertilization of our soil—is equally accomplished in each instance.

But this Court has already disposed of this "specific-enumeration" theory as sought to be applied to the free list. This act of 1883 duties "carriages and parts of carriages," at 35%; yet when imported as "household effects" for a particular individual use, they come in free.

Arthur v. Morgan, 112 U. S.

IV.

There are not "two rates of duty" applicable to this importation. Upon all the facts, it is either dutiable under one clause, or free under the other. The undisputed facts make it exempt from duty. There are few commodities which *might* not fall under one enumeration, were the other absent. An article of wearing apparel is a manufacture of silk or of wool; that does not make it liable to the rate of the highest-dutied enumeration. This Court has so declared.

EDWIN B. SMITH,
Of Counsel for Defts. in Error.

150 a 576

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1 In the circuit court of the United States for the western district of Arkansas.

Pleas and proceedings before the honorable Isaac C. Parker, judge of the district court of the United States in and for the western district of Arkansas, holding circuit court. In the case of United States vs. Robert M. Hall, indicted for murder.

2 United States of America, western district of Arkansas. In the circuit court, August term, A. D. 1891.

UNITED STATES
vs.
ROBERT MARSHAL. } Murder.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That Robert Marshal, on the 4th day of August, A. D. 1891, at the Choctaw Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one James Yates, a white man and not an Indian, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said Robert Marshal, with a certain gun then and there charged with gunpowder and one leaden bullet, which said he, the said Robert Marshal, in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off, to, against, and upon the said James Yates, and that the said Robert Marshal, with the leaden bullet aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by the said Robert Marshal discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him, the said James Yates, in and upon the left side of the breast of him, the said James Yates, giving to him, the said James Yates, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the gun aforesaid by the said Robert Marshal, in and upon the left side of the breast of him, the said James Yates, one mortal wound of the depth of four inches and of the breadth of half an inch; of which said mortal wound he, the said James Yates, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Robert Marshal, him, the said James, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

W. H. H. CLAYTON,
United States Attorney, Western District of Arkansas.

(Indorsed:) No. 24. United States vs. Robert Marshal. Murder. A true bill. M. T. Dyke, foreman. Witnesses: B. G. Depew (lives 8 miles S. W. Muskogee, I. T.), Geo. Perry (lives at So. McAllester, I. T.), Bart Salmon (lives at Red Oak, I. T.), James Free (lives at Lehigh, I. T.), John Salmon (Red Oak, I. T.), John H. McKenzie (So. McAllister, I. T.), Henry Roberts, So. (McAllister, I. T.), Filed Oct. 17, 1891. S. Wheeler, clerk.

3 In the circuit court of the United States for the western district of Arkansas, February term, 1892.

TUESDAY MORNING, 8½ o'clock, *March* 29, 1892.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

Record entries.

UNITED STATES *vs.* ROBERT MARSHALL. } Indictment for murder, No. 24. (Pleads as Robert Marshall Hall.)

On this day come the the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorney, and having had hearing of said indictment and it being demanded of him concerning said indictment above specified and charged upon him how he would acquit himself thereof, he says his right name is Robert Marshall Hall and that he is not guilty as charged in said indictment, and puts himself upon the country.

Ordered by the court that this cause be and the same is hereby continued to the next term of this court and set down for trial June 15th, 1892.

TUESDAY, *April* 19, 1892.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his application in writing, verified upon oath, praying for witnesses in his behalf at the expense of the United States.

FRIDAY, *April* 22, 1892.

(Caption omitted.)

4 On this day come on to be heard the application for witnesses in this cause, filed April 19, 1892, and the court being fully advised in the premises doth allow the same. It is therefore ordered that the legal expense of procuring the testimony of Rob't Abbott, R. P. Hooper, John Ridenhour, Ed. G. Spange, John J. McCarty, Pat Gleason, Lulu Mayes, Barney Dorris, Stella Smith, B. F. Roberts, Ida Bullard, James Walker, and two others whose names are unknown, be paid by the United States and that a subpœna be issued for them returnable June 15th, 1892.

TUESDAY, *April* 26, 1892.

(Captain omitted.)

Ordered by the court that the following case, now pending, be continued and set down for trial as follows, to wit: No. 24, Robert M. Hall, murder, July 28, 1892.

SATURDAY, *July* 16, 1892.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his application in writing, verified upon oath, praying for witnesses in his behalf t the expense of the United States.

5 SATURDAY, *Aug.* 13, 1892. August Term.

(Caption omitted.)

On this day come the defendant by his attorneys and files his motion for a continuance in this cause.

Said motion coming on to be heard and the court being well and sufficiently advised in the premises doth overrule said motion.

(Caption omitted.)

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Messrs. Frederick & Rutherford; and it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause, and a full and complete list of the witnesses in this cause; and that he has also been served with a full and complete list of the panel of petit jurors and alternates, as selected and drawn by the jury commissioners for the present term of this court, more than two entire days heretofore; and having heretofore had hearing of said indictment and pleaded not guilty thereto, it is, on motion of plaintiff, by its attorney, ordered by the court that a jury come to try the issue joined.

Whereupon the clerk called the entire panel of the petit jury, and after challenge by both plaintiff and defendant the following were selected for the trial of this cause, to wit:

John Birchfiel, Thomas Cauthron, Fletcher Gossett, George Grebb, James Harrison, David C. Jones, James M. Langston, Burton H. Moore, John K. Mount, Wm. F. Mayo, Wm. W. Mannon, Wm. Reeves, twelve good and lawful men of the district aforesaid duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence,

6

and after hearing a portion of the evidence and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court.

And it is further ordered by the court that said jury be kept together and that the marshal of this district furnish meals and lodging to said jury, and bailiff in charge, until discharged by order of said court.

MONDAY, *Aug.* 15, 1892.

(Caption omitted.)

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Messrs. Frederick & Rutherford; and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit:

John Birchfiel, Thomas Cauthron, Fletcher Gossett, George Grebb, James Harrison, David C. Jones, James M. Langston, Burton H. Moore, John K. Mount, Wm. F. Mayo, Wm. W. Mannon, Wm. Reeves, who took their seats in the jury box, and after hearing further evidence and there not being time to further progress in the trial of this cause, they were put in charge of the sworn bailiff aforesaid.

TUESDAY, *Aug.* 16, 1892.

(Caption omitted.)

On this day come the United States of America, by Wm. H. H.
7 Clayton, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Messrs. Frederick & Rutherford; and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit:

John Birchfiel, Thomas Cauthron, Fletcher Gossett, George Grebb, James Harrison, David C. Jones, James M. Langston, Burton H. Moore, John K. Mount, Wm. F. Mayo, Wm. W. Mannon, Wm. Reeves, who took their seats in the jury box, and after hearing the balance of the evidence and a portion of the argument of counsel, and there not being time to further progress in the trial of this cause, they were put in charge of the sworn bailiff aforesaid.

WEDNESDAY, *Aug.* 17, 1892.

(Caption omitted.)

On this day come the United States of America, by Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal and by his attorneys, Messrs. Frederich & Rutherford; and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn baliff of this court, to wit:

John Birchfiel, Thomas Cauthron, Fletcher Gossett, George Grebb, James Harrison, David C. Jones, James M. Langston, Burton H. Moore, John K. Mount, Wm. F. Mayo, Wm. W. Mannon, Wm. Reeves, who took their seats in the jury box, and after hearing the balance of the argument of counsel and receiving the charge of the court retired, in charge of the sworn bailiff as aforesaid, to consider of their verdict; and after some time returned into court the following verdict, to wit:

8 "We, the jury, find the defendant guilty of murder as charged in the within indictment."

(Signed) THOS. CAUTHRON,
Foreman.

Whereupon the jury was by the court discharged from the further consideration of the case and the said defendant remanded to the custody of the marshal to await final sentence.

FRIDAY, *Aug.* 19, 1892.

(Caption omitted.)

On this day come the said defendant, by his attorneys, and files his motion to set aside the verdict of the jury and for a new trial in this cause.

THURSDAY, *Sept.* 15, 1892.

(Caption omitted.)

On this day come on to be heard the motion heretofore filed by the defendant to set aside the verdict of the jury and for a new trial in this cause; and the court being well and sufficiently advised in the premises, doth overrule said motion.

9 In the circuit court of the United States for the western district of Arkansas, August term, 1892.

MONDAY MORNING, 9 o'clock, *Sept. 19th*, 1892.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES
vs.
ROBERT M. HALL. } Indictment for murder, No. 24.

On motion of Wm. H. H. Clayton, esq., attorney for the western district of Arkansas, the said defendant, Robert M. Hall, was brought to the bar of the court in custody of the marshal of said district, and it being demanded of him what he has to do or can say why the sentence of the law upon the verdict of guilty, heretofore returned against him by the jury in this cause on the 17th day of August, 1892, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon the premises being seen and by the court well and sufficiently understood, it is considered by the court that the said marshal of the district aforesaid cause the said Robert M. Hall to be taken hence, and him, the said Robert M. Hall, safely and securely keep, from the date hereof until Wednesday, the 2nd day of November, A. D. 1892, and on that day, between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said Robert M. Hall to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock
10 in the forenoon and five o'clock in the afternoon, on Wednesday, the said day of November, in the year of our Lord one thousand eight hundred and ninety-two, cause the said Robert M. Hall to be hanged by the neck until he is dead.

10½ In the circuit court of the United States for the western district of Arkansas, August term, 1892.

MONDAY MORNING, 8½ o'clock, *Sept.* 19, 1892.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES
vs.
ROBERT M. HALL. } Murder.

On this day comes the said defendant by his attorneys, and tenders his bill of exceptions and asks that the same be signed and made a part of the record in this cause, which is accordingly done.

And the defendant also files his assignment of errors, and petition for writ of error to the Supreme Court of the United States, together with his petition, supported by affidavit, praying for an appeal in this cause at the expense of the United States.

11 United States circuit court. Western district of Arkansas, August term, 1892.

UNITED STATES
vs.
ROBERT MARSHALL HALL. } Murder.

Bill of exceptions.

Be it remembered that on this the 13th day of August, 1892, the same being a day of the August term of said U. S. circuit court came on to be heard the above-styled cause.

The defendant made and filed his application and motion for a postponement of the case which is as follows, to wit:

Now comes the defendant, R. M. Hall, who is indicted for the murder of Jim Yates, and states to the court that he can not safely go to the trial of this case without the evidence and presence of Jesse Trout, for whom application has heretofore been made and allowed and subpœna issued. By Jesse Trout defendant can show that on the night that Yates was killed he (deft.) went to her house, about 150 yards from the place where Yates had two hours before beaten and kicked defendant, and that defendant came to her house and stated that he had lost his papers and book from his pocket when Yates had beaten him, and that he (deft.) was looking for said papers and book, and that he did not want to go back up where Yates had beaten and kicked him till he, Yates, had gone, and that she, witness Jesse Trout, told him that Yates was gone and that there would be no danger of meeting or seeing him then, and that he
12 could safely go on up there to look for his papers. That relying on what she, Jessie Trout, told him, he (deft.) started to go up to said house where Yates had beaten him for the purpose of looking for his papers and not expecting to meet or see said Yates, and was met by Yates, who came toward him firing his pistol at him (deft.) and shot this defendant in the arm, and defendant then drew his pistol and fired at Yates in self-defense and in order to save his own life.

Defendant states that he can not prove these facts by any other witness who is in attendance on this Court; that said Jessie Trout is not in attendance on this court; that she is within the jurisdiction of this court as he is informed and believes and that she can be found and her presence obtained in a short time; that he is informed she is at Coal Gate, in Choctaw Nation; that she is not absent by his consent or procurement; that this application is made in good faith, that justice may be done him; that if this case is postponed he will use all diligence to procure her attendance at the next term of this court or if possible he will have her present at some future day of the present term; that he has used all reasonable diligence in his power to obtain her presence at this term. He states that the matters and things set forth in this application as being within his own knowledge are true and those things not within his own personal knowledge he believes to be true.

R. M. HALL.

Subscribed and sworn to before me this 13th day of Aug., 1892.

STEPHEN WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

13 The court upon the hearing of said motion overruled said motion for the following reason:

14 In regard to said application the following proceedings were had, to wit:

The DISTRICT ATTORNEY. Thirteen days have elapsed since that subpœna was returned non est. The application for continuance is filed to-day when the case is called for trial. The witnesses for the Government and the witnesses for the defense have been here for a great many days. They have been kept here since the 28th of July; this is the 12th of August, making 15 days. Counsel state to your honor that the witness is at Coal Gate, in this jurisdiction. I do not know when they learned that witness was at Coal Gate, but it seems to me there has been no diligence shown at all to procure the witness; that if the witness was not here that it was their duty at least to have filed their motion for a continuance on the day the case was set for trial in order that it might be disposed of.

The COURT. On the day that this subpœna was returned not served, which was on the first of this month, 13 days ago.

The DISTRICT ATTORNEY. Either there ought to have been at that time a motion for a continuance filed or else the defendant's counsel should have procured another subpœna and informed the marshal where the witness was, if they knew. There ought to have been some notice given of it to the court and not wait until the case is just ready for trial. Upon yesterday forenoon I sent off telegrams for witnesses who will be here to-day, and did this at some trouble and expense to the Government, expense of telegrams, and expense of witnesses who will be here, mileage here and back again, and at least one day's per diem will have to be paid, and the per diem of the witness already here; I don't know how

15 many of them there are; I know the defense have a great many of them. All of their per diems will have to be paid for 13 days, and it seems to me, if your honor please, that this application for continuance is not in apt time, that no diligence has been shown, and the case ought not to be continued upon this plea.

Mr. FREDERICK (of counsel for defendant). If the court please, the testimony of this witness is very material in this case.

The COURT. I do not think this application was sufficient to have been allowed, in the first place. It says, "I, Robert Marshal Hall, ask the court for subpœna for Jesse Trout and William . That the location is not given—yes, I see now that they reside at McAlester. I hadn't noticed that. "Who resides at McAlester." That is, one of the witnesses, according to the grammatical construction. That may be taken perhaps as a location, that they were in the jurisdiction of the court. That is the only location there is in the application, that they are in the jurisdiction of the court at all, but the fact that they reside at McAlester and are there would be sufficient I apprehend.

Mr. FREDERICK (of counsel for defense). The court would take judicial notice of that fact, I apprehend. If the court please, this witness, Jesse Trout, and the other one to—but I have no information as to the whereabouts of the other one. The testimony of Jesse Trout would be very material to this defendant, and that materiality is set forth in this application, this motion for continuance. As far as diligence is concerned we have shown whatever diligence we could. We had never known until

yesterday, or this morning, I believe, what the return was on that.
16 Of course, counsel are presumed to know what the returns show, but we could not tell by looking at that subpœna when that subpœna was returned, whether it was returned yesterday or when. We could have looked among the witnesses and ascertained that witness was not here. While it is not set up in the motion for a continuance, yet the deputy who signed the return to that subpœna, Mr. Shellburn, told me that he knew where this woman was, Jesse Trout, and he could get her. I had relied upon her being here upon that statement. I would suppose from what he said that he would subpœna her, and have here here. But then after the subpœna was issued on the 27th, and the return made, as I suppose on the marshal's books on the first, as I suppose they will show, we were not aware of the reasons why she was not subpœnaed, and we were expecting that she would come. This case was set for no particular time, no particular day in this term, and there are several cases on the docket that are ahead of it, one capital case, I notice—a rape case. As your honor is aware, we have personally been engaged in the trial of cases all along, and have not had the opportunity to investigate these matters we otherwise would have had, and the materiality of this testimony to the case is apparent—it goes to the very gist of the case; it is very materia. And this application states that he can not prove it by any other witnes who is in attendance upon this court. If we could get the case put off for a few days we think she could be obtained then—three or four or two or three days, or for ten days, and we can get her here in that time.

The COURT. The record shows that the subpœna was returned on the first day of August, B. T. Shellburn, deputy.

17 This application locates the witnesses at McAlester, that is, if you consider that statement as being the residence of both witnesses, and, of course, that is all you can go by, where the deputy does not personally know the witnesses. Now, I do not regard this fact as set up in this application, the evidence of this witness, as being very much of a fact, anyhow, but that is not the consideration that enters into the mind of the court in passing upon this application. The court is very liberal in allowing witnesses, and I want to take occasion here to say that from necessity we will hereafter be compelled to adopt the rule in the matter of substituting witnesses. This has grown to such enormous proportions that we have to check it some way or another. In every case where it is desired to substitute a witness for one who has been allowed there must be a written application filed in the regular way—not come up here and stick in the name Smith, or Jones, or Brown, who will come here and swear to a fact that nobody knows anything about, and do not know whether it is a material fact or not. He come up here and there is no way to tell what he is or what he knows. This, of course, has nothing to do with this case. I take this occasion to announce that as a rule after this proper application must be made setting out what the witness will swear to.

This subpœna was returned not served on the first day of the month, 13 days ago, ample time to have another subpœna, an alias subpœna, issued, and for the marshal to go after the witness and have her here, or to have had her attached. There has not been sufficient diligence shown, and for that reason the application for continuance will be overruled.

Mr. FREDERICK (of counsel for defendant). We save the point.

18 The COURT. You can have her here by Monday morning if you show any diligence.

Mr. FREDERICK (of counsel for defendant). Will the court direct that another subpœna be issued?

The COURT. Yes; with the understanding that it will not work a delay in the case. Let an alias subpœna issue, Mr. Clerk.

The COURT. In regard to the method of challenging the jury, you may have your choice of challenging by the old common law rule or by the method adopted in this court.

Mr. FREDERICK (of counsel for defendant). We prefer the method heretofore followed in this court. We take no exception to the method of challenging the jury.

Here court adjourned until 1:30 p. m.

19 The United States, to maintain the issues on its part, introduced and examined the following-named witnesses: R. G. Depew, Bart Salmon, John Salmon, John Mitchell, writ of removal of def't, James Free, William C. Yoes, J. R. Stephens, who testified as follows, to wit:

20 AFTERNOON SESSION, 1:30 P. M., *August 13th*, 1892.

R. G. DEPEW, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. Your name is R. G. Depew?

Answer. Yes, sir.

Q. Where do you live?

A. I live at Muskogee.

Q. Do you know this defendant?

A. Yes, sir.

Q. What is his name?

A. Robert Marshal is what I called him.

Q. Is that the name he went by up there?

A. Yes, sir.

Q. Did you know James Yates in his lifetime?

A. Yes, sir.

Q. Was he a white man or an Indian?

A. White man, I guess; I could not say positive what he was. That is what they called him.

Q. He passed as a white man?

A. Yes, sir.

Q. What is the defendant, a white man or an Indian?

A. White man, I took him to be.

Q. How long have you known him?

A. Well, it was two or three months that he was around down there; I wasn't there all the time.

Q. Around what place?

A. South McAlester.

Q. What was his business there, do you know?

A. When I got acquainted with him he was boarding at the Kansas City Chop House, there at Mr. Gleason's, and afterwards he went into a little grocery there. Had a store for selling groceries.

Q. What kind of goods was he selling?

A. Well, a variety; bacon, coffee, sugar, and different things what would be needed in a grocery store.

21 Q. Do you know where he came from?

A. No, sir; I don't know. I could not say that I ever asked the man anything about it.

Q. You say you knew Yates?

A. Yes, sir.

Q. What was his business?

A. He was a deputy marshal for the McAlester court.

Q. Do you know how long he had been a deputy marshal?

A. No, sir; I could not answer that. I worked down towards Red River, and I don't know when he was commissioned, or anything about it.

Q. Were you a deputy marshal for that court?

A. Yes, sir.

Q. Is Yates alive or dead?

A. He is dead.

Q. Where were you the night he was killed?

A. I was at the Kansas City Chop House, there at Gleason's.

Q. He kept the Kansas City Chop House, did he?

A. Yes, sir; I believe that is the name of it; chop house I think it is.

Q. Was the defendant boarding there at that time?

A. Yes, sir; he was taking his meals there, or at least I seen him eating there.

Q. Now, then, on the night that Yates was killed please state whether or not you saw the defendant.

A. Yes, sir; I seen him that evening late.

Q. What time?

A. About sundown, I reckon.

Q. Where was he?

A. He was there at his place of business, at the store, maybe a little before sundown, I could not say positive what time, there at South town.

Q. Was there anybody with him there?

A. There was a good many people there standing around; I don't know who they were or anything about it. His store door was open.

Q. Did you see him again that night?

A. Yes, sir; I seen him that night.

22 Q. What time in the night?

A. It must have been about 12 o'clock, or may be a little later; it may have been 1:00 o'clock.

Q. 12 or one o'clock?

A. Yes, sir.

Q. Where was he then?

A. He wass at Mr. Gleason's, at the Kansas City Chop House.

Q. Had he been there before that evening at the chop house?

A. Yes, sir; he eat his supper there, I think.

Q. What time did he leave?

A. I could not tell you exactly.

Q. About what time?

A. I can't say; I didn't see him; I was out some place, and I didn't see him, and I don't know anything about that.

Q. Do you know where he was during the evening, of your own knowledge, up to 12 or one o'clock?

A. No, sir; I don't know anything about it.

Q. Had you gone to bed when he came there at 12 or 1 o'clock that night?

A. Yes, sir.

Q. You may go on and state what occurred when he came there?

A. I was sleeping in the side room, and I heard someone talking out with Bart Salmon; I heard Mr. Marshal, the defendant, talking to Bart Salmon, and wanted a pistol.

Q. Where was Bart Salmon?

A. He was in the dining room; they slept in the dining room, and I was right in the room next to it, and Bart had him a pallet in there and slept in there.

Q. You say the defendant was trying to borrow a pistol?

A. Yes, sir.

Q. You may state now all that occurred there, what he did, and what occurred from the time you first heard him until he left?

A. It seemed he came in and asked for the pistol, and Mr. Sal-
23 mon told him, I believe, it was in the front room, or somewheres in there in another room, I could not say positive which room, and he went and got it. I was in this room here, and I didn't go to see his, only what I could hear; he had got ahold of his pistol, and Bart was trying to get it, and I heard him telling him to stand back.

Q. Heard the defendant tell Bart to stand back?

A. Yes, sir; I heard that several times, to stand back, and he wanted the cartridges and all; and that was the way of it.

Q. I want you to state all he said, what he wanted it for, and all about it.

A. He said that somebody had called him a damned son of a bitch, and he was going to kill him; that no man could live that done that. Afterwards he got the pistol, and he told Bart that he would send the pistol back to him; something to that effect. I was in this other room, and I heard this, and he left——

Q. Do you know a man that worked with the defendant at his store?

A. I am not much acquainted with him.

Q. Did you see him that night?

A. Yes, sir; I saw him after I came up in that room that night.

Q. Where was he?

A. He was in Mr. Gleason's house there in the room.

Q. Did you hear the defendant say anything to him?

A. I could not say; there was several there.

Q. Did you hear him say anything about giving him a power of attorney?

A. I heard him speak to someone about that.

Q. What did he say?

A. He said he would give it to settle up his business; he would
24 give a power of attorney. I don't know who it was he said, but he said to somebody that he would give them power of attorney to settle up his business there.

Q. Why?
A. I don't know why.
Q. Did he say why he was going to give him power of attorney to settle up his business?
A. That was all that I heard in there. It was in the other room. He was in the dining room and I was in this room here.
Q. You were in separate rooms?
A. Yes, sir.
Q. Salmon was in the other room?
A. Yes, sir.
Q. Did he say who it was that called him a son of a bitch that he was going to kill?
A. No, sir; didn't mention any names.
Q. Did you start to go into the room?
A. Yes, sir.
Q. State what occurred, please?
A. I started to open the door a little; I opened it to go into this room, and he put his six shooter against it and told me to stay in there.
Q. Did you hear him say anything else besides that the man had called him a son of a bitch, and he was going to kill him, and that no man could live that called him a son of a bitch?
A. He said a heap; I could not recollect all that he said now.
Q. Did you see him when he got the pistol from Salmon?
A. No, sir.
Q. Did you see him have any pistol that night?
A. No, sir; he was standing in there and I could not see him at all.
Q. Did you see him when he went out?
A. No, sir; I didn't.
Q. You started to go in?
A. Yes, sir.
Q. How did you know it was him?
A. All I know is just by his voice.
Q. You did not see him at all?
A. No, sir; I felt the pistol come against the door.
Q. Did he say anything to you except for you not to come in there?
A. That is all he said; said not to come in there; said to stay in there where I was.
Q. How long was he there at that place?
A. Well, I suppose he was there ten or fifteen—I could not tell just exactly; it is guess work with me—*tue*, or fifteen, or maybe 20 minutes; I could not tel' you.
Q. Then what occurred after that?
A. Me and Bart—I came out an' wanted Bart to go on up, follow him, and Bart said "I haven't got any pistol."
Q. Why did you want to follow him?
A. I wanted to see what he was going to do with those pistols.
Q. You asked Bart to go, and he did not want to go?
A. Yes, sir.
Q. Did he give you any reasons for not going?
A. He said he did not have any gun.

Q. Did you go any ways?

A. Yes, sir. Me and Bart stepped up apiece; stepped up the road; walked a few steps; I don't know how far; maybe 100 or 200 yards up the road towards the place.

Q. Go right on now; state the occurrences.

A. And after we got out of the house a little piece I heard some shots awhile afterwards.

Q. About how many?

A. It was five or six shots that shot.

Q. In what direction?

A. Up towards north of where we were.

Q. Do you know where Chippy Hill is?

A. Yes, sir.

Q. What direction from Shippy Hill?

A. It sounded right at Chippy Hill, as they call it; right up in that direction. There was one shot; it appeared like it was shot now, and in a little bit they began pretty lively.

Q. One shot at first and then after that begin shooting rapidly?

A. Yes, sir.

26 Q. Go on.

A. We went up here a peice, and Bart wouldn't go, and wanted me to give him my pistol, and he would go on; and I told him I would not do it, and then we came back and went to bed. Some time about 4:00 o'clock Yandell—Dad Yandall, we call him, I don't know his given name—came down and told us——

Q. He informed you that Yates was up there, shot?

A. Yes, sir. Me and Dad Yandall went up and waked up Jack Ellis, and Bart Salmon was to go and wake up John Salmon.

Q. Another deputy marshal?

A. Yes, sir. And Mr. Williams—I would not be positive about that—or somebody else. I went right on up and waked up Jack Ellis, and we went on up——

Q. Who went up?

A. Me and Jack Ellis.

Q. Did he go with you or were you ahead of him?

A. Me and Dad were a little ahead of him, I suppose; we got up to the body a little before him; and the body was laying in the road or trail.

Q. Who was?

A. Jim Yates. He was laying on his back, and one foot kind of drawed up.

Q. In the road?

A. Yes, sir; laying just kind of cataornored across the trail. It is a trail, and he was laying kind of with his head in that way, and his pockets turned wrong side out.

Q. Turned inside out?

A. Yes, sir.

Q. Was he dead or alive?

A. He was dead.

Q. Any wounds upon him?

A. Yes, sir.

Q. Where was he shot?

A. There was a shot just went in his shoulder, like; looked like it half buried itself, and went right along here——

Q. Struck the right shoulder, crossed along the shoulder and half buried itself?

27 A. Yes, sir; just buried itself, looked like; half buried itself.

Q. It tipped the right shoulder, half buried itself there, then struck in the lower part of the neck on the right side and came out on the lower part of the neck on the left side?

A. Yes, sir.

Q. It tipped the right shoulder, then went into the lower part of the neck on right side, came out on the left side; is that right?

A. Yes, sir.

Q. Any other shots on him?

A. Yes, sir; there was another shot somewheres in here about the breast, one side or the other, about the nipple.

Q. Do you remember which side, left or right?

A. I won't say positive, but I think the left side.

Q. How far from the nipple?

A. It wasn't but a little ways, an inch or——

Q. Did that shot go through him?

A. I never noticed that shot.

Q. He had two shots?

A. Yes, sir; and a scar looked like it had been cut up here on one of the eyes; I could not say which one, above or below it.

Q. A gash in his eye?

A. Yes, sir.

Q. A cut under one of his eyes or above it, you do not know which?

A. Yes, sir; I think it was right under the left eye; I would not say positive.

Q. And these two shots upon him?

A. Yes, sir.

Q. His pockets turned inside out?

Q. Yes, sir.

Q. Any weapons upon him?

A. No, sir.

Q. Do you know whether any pistol was found?

A. Yes, sir; the kid, a boy, found it there, and showed me where he found it. I had the pistol.

28 Q. Do you know anything about the cartridges?

A. Yes, sir; there were five cartridges in it, and one that had no cartridge in it.

Q. Five cartridges in the pistol, and one that had no cartridge; was there any hull in that?

A. No, sir.

Q. It was loaded all around except one cylinder, which had no cartridge or empty hull in it?

A. Yes, sir.

Q. Did you see anything of his cartridge belt?

A. Yes, sir.

Q. Where was that?

A. That was off going north to the right of the road—or left of the road going north.

Q. How far from where the body was laying?

A. Well, sir, about 25 or 30 steps from the body.

Q. What kind of a place?

A. In these little running oaks, about that high (indicating about 3 feet).

Q. Were there any cartridges in it?

A. No, sir.

Q. It was empty of cartridges?

A. Yes, sir.

Q. Laying off about 25 or 30 steps from the body?

A. Yes, sir.

Q. What did you do with Yates?

A. We packed him into this Lou Mays' house.

Q. Did she live there?

A. Yes, sir; that was where she staid.

Q. That is up on Chippy Hill?

A. Yes, sir.

Q. Is she one of the "chippies?"

A. Yes, sir.

Q. How far was it from Lou Mays' house to where you found this body?

A. Well, sir, I think it was about halfway; I suppose the body was about 150 yards betwixt the two houses——

Q. Betwixt what two houses?

A. He was laying betwixt two houses in a trail that run between two houses.

Q. How far was Lou Mays' house from where he was laying?

29 A. About 50 or 75 yards.

Q. Do you know the house in which it is said they were gambling?

A. Yes, sir.

Q. Whose house is that?

A. It is a beer joint; I don't know whose house that was.

Q. How far was he laying from that house? Is that the house you speak of that he was laying halfway between the two houses?

A. Yes, sir; about halfway I think it was; it was not any great distance where they said he was gambling, between that and this house of Lou Mays', where we carried Yates.

Q. Was Lou Mays at home?

A. No, sir; she said she wasn't; I could not tell you anything about that.

Q. Did you see her there?

A. I saw her there when I went.

Q. I asked you if she was there when you carried the body up there?

A. Yes, sir; she was there then.

Q. She was at home at that time?

A. Yes, sir.

Q. Of course what she said about where she was when the shooting occurred, I am not entitled to that. Then you took the body into her house?

A. Yes, sir.
Q. Did you see anything of Robert Marshal *went* you went up there?
A. No, sir.
Q. Did you ever see him afterwards until he was arrested?
A. No, sir.
Q. What became of his business?
A. I think that his father come and settled it up; I saw the man there that claimed to be; I saw him one day go in the store; I don't know what he did; I was gone away.
Q. You saw the defendant no more about his business after that
30 or about town anywhere?
A. No, sir; I would be away from town about every week.
Q. Your business called you away?
A. Yes, sir.
Q. You rode for that court?
A. Yes, sir.
Q. And you saw nothing more of him?
A. No, sir.
Q. You say that he wasn't there that morning when you went up there?
A. No, sir.
Q. How far was it from the Kansas City Chop House, the place where he was talking that night, up to the place where Yates was killed?
A. Well, sir, I think it is near three-quarters of a mile.
Q. How far is it from Old McAlester to where the killing occurred?
A. I think it is about half way between the two McAlesters. That is what they call it.
Q. Old McAlester is north of South McAlester?
A. Yes, sir.
Q. The place they call Chippy Hill is about half way between the two.
A. Yes, sir.
Q. How many houses are there at Chippy Hill?
A. There is—indeed, I could not tell you. There is three or four. There is people here that can tell you; I don't know.
Q. On which side of the railroad did this killing occur?
A. On the east side.
Q. On the side towards Fort Smith?
A. Yes, sir.
Q. And north of South McAlester three-quarters of a mile?
A. Yes, sir; somewheres near that.
Q. That puts it in this jurisdiction. When was it that this occurred?
A. I think it was some time along about the 4th of August. I think that was the fourth morning. I heard some of them speak about the date or something.
30½ Q. The 4th of August, 1891?
A. Yes, sir.
Q. A year ago this August?
A. Yes, sir.
Q. How old a man was Yates?
A. I suppose he was 35, I reckon. I don't know what his age was.
Q. You knew his pistol, did you?
A. Yes, sir; I knew it then.

Q. What condition was his pistol in?
A. It would not revolve any at all.
Q. What was the matter with it?
A. You could revolve it by twisting it around in your hand.
Q. Do you know what was the matter with it?
A. No, sir; I could not tell you what was the matter with it. Jack Ellis and all of us looked at it.
Q. You didn't examine it with the view of finding out what was the matter with it; you did not take it apart?
A. No, sir; I didn't take it apart to see what it was. There was something the matter with it.
Q. What became of the pistol after that, do you know?
A. No, sir; I don't know what became of it. I fetched it here and took it back again to the office, put it at the office.
Q. This occurred on the 4th of August about three-quarters of a mile north of South McAlester?
A. Yes, sir.
Q. How far east of the M., K. & T. R. R.?
A. I suppose a little over a quarter of a mile, the nearest point.
Q. How long had it been since you had seen Yates?
A. It was that evening I saw him.
Q. Where did you see him?
A. There at the Chop House.
Q. What time?
A. It was about sundown—after supper, anyway.
Q. Did he take supper there?
A. He was there. I could not tell you whether he eat supper
31 or not. I didn't see him eat supper. He was there after I eat my supper; probably sundown, maybe not so late.
Q. Was the defendant sober or was he intoxicated when you saw him about midnight?
A. I could not tell you about that, whether he was sober or drunk?
Q. Did he make any other complaint about the man except he had called him a son of a bitch?
A. No, sir; none that I heard, only he said that somebody had called him a son of a bitch and couldn't live; something of that kind.

Cross-examination by Mr. C. J. FREDERICK:

Q. Were you a deputy marshal at that time?
A. Yes, sir.
Q. Commissioned by the marshal of the Indian Territory?
A. Yes, sir.
Q. How long have you been officiating in that capacity?
A. I don't know.
Q. You had recently become a deputy marshal, had you not?
A. No, sir; I was appointed when the court first organized.
Q. You are one of the first ones, one of the pioneers?
A. Yes, sir.
Q. How long had Yates been a marshal?
A. I could not tell you that at all.
Q. Was he a posse of yours at one time?

A. No, sir; he never was my posse.
Q. He didn't go with you then?
A. He went with me—how do you mean?
32 Q. Did he go with you as a deputy marshal?
A. Yes, sir; he went with me down to Red River.
Q. Bart Salmon was a deputy too, was he?
A. Yes, sir.
Q. John Salmon?
A. Yes, sir.
Q. Jack Ellis?
A. Yes, sir.
Q. Jack Ellis was a deputy for this court?
A. I would not say positive about that.
The DISTRICT ATTORNEY. Salmon had been a deputy for this court; I don't know whether he was at time or not.
Mr. FREDERICK (of counsel for defendant). They were all South McAlester deputies with the exception of Salmon and Jack Ellis?
A. Jack Ellis was for this court.
Q. He was a constable for that court, was he not?
A. I could not tell you about that, for I don't know a thing about the constables.
Q. You say you saw Yates's pistol that evening, the evening that he was killed?
A. I didn't see it the evening he was killed; I seen it after he was killed.
Q. When did you see it before he was killed?
A. I think it was that day some time.
Q. That same day?
A. Yes, sir; that day some time.
Q. When was it you saw it when it would not revolve?
A. It was up there when Yates was dead up there.
Q. Five loaded chambers in the cylinder?
A. Yes, sir.
Q. One empty cylinder without any shell?
A. Yes, sir.
Q. Showing it hadn't been fired?
A. Yes, sir; that is what it looked to me like. I just merely looked at it.
Q. That was your opinion, your judgment at that time, that it had not been recently fired?
A. That was my judgment about it; yes sir.
33 Q. That was Yates's pistol?
A. Yes, sir; at least it was took to be that pistol; I think it was that.
Q. You took it to be it?
A. Yes, sir.
Q. Did he have any other one?
A. No, sir; not that I know of.
Q. Do you know whether he carried a pistol with him that evening or not—the evening before he was killed?
A. I could not tell you anything about that.
Q. You saw him after supper?

A. I didn't notice whether he had a pistol or not.

Q. How many pistols did he have?

A. I could not tell you that; that is the one he traded it to a nigger—he had one that he had cut with glass and stuff, and he traded it with a nigger down at Lake West. That is the one that he had cut up with glass; he got another pistol, and this man up here at Muskogee cut it off and put a sight on it.

Q. When was that?

A. It was when we made a trip to Red River before he was killed.

Q. Two or three months before this happened?

A. It was a month, maybe not quite so long, maybe longer; I don't know exactly about that. It might have been cut off the month before.

Q. Is that the one you are talking about having found up there on the hill?

A. Yes, sir.

Q. That is the one you found up there, is it?

A. Yes, sir.

Q. Is that the one that he traded to the nigger?

A. No, sir; that is the one he got from the nigger.

Q. You say it was a month or two before that that he got it from the nigger?

A. I think it was; I could not tell you; if I had my book I could tell you; it might have been a month.

34 Q. Some considerable time beforehand?

A. Yes, sir; sometime beforehand.

Q. You don't know whether he had another?

A. No, sir; I don't know a thing about that.

Q. Did he carry a pistol that would not shoot, wouldn't revolve?

A. I don't know; he said that day he was going to get it fixed.

Q. Do deputies generally carry pistols that will not revolve—will not shoot?

A. I wouldn't think they would; I wouldn't want to, but I could not answer——

Q. Did you ever know him to carry a pistol that would not shoot?

A. I don't know a thing about that.

Q. You do not know?

A. No, sir; I don't know anything about what he would do. All I know is what he told me that evening before.

Q. You did not see the pistol found there?

A. No, sir.

Q. A kid, you say, gave it to you?

A. Yes, sir; there was a boy; I don't know what his name was.

Q. A boy?

A. Yes, sir.

Q. You don't know where the boy got it?

A. He showed me.

Q. You didn't see him get it?

A. No, sir; when I saw the pistol it was in the boy's hands. I forget whether I got the pistol there; I could not tell you; the kid went and showed me where he had found it, right there.

Q. You were not up at Chippy Hill that evening before that, were you?

A. No, sir.
Q. How long since you had been up there?
A. I went up there every once in a while. I went up there several times.
35 Q. Officers had to go up there very frequently, didn't they?
A. I went up there on business.
Q. I mean for business?
A. They had several fights there, and I would go up there.
Q. Nearly all the deputies had to go up there, didn't they?
A. Some of the lawyers went up once in a while, too.
Q. Did they hold court up there?
A. Sometimes they would. They had a row up there every once in a while, and I went up once in a while, and the lawyers went up once in a while.
Q. Did they hold court up there?
A. No, sir.
Q. You went up there on business and the lawyers went up on business?
A. I went up on business and I suppose the lawyers went up on business.
Q. How long before that had it been since you had been up there?
A. I could not tell you.
Q. The night before?
A. No, sir.
Q. You generally went at nights, didn't you?
A. No, sir.
Q. You always went in the daytime?
A. Yes, sir.
Q. You never was up there after night?
A. I don't say but what I was. I went up there once after a whisky peddler, and caught him.
Q. Good place to catch whisky peddlers, was it not?
A. You know what kind of a place it is. It is generally them kind that goes there.
Q. It was a good place to catch whiskey peddlers?
A. Yes, sir.
Q. You live at Muskogee?
A. Yes, sir.
Q. You lived there at that time, did you?
A. Yes, sir; about 7 miles west or southwest of Muskogee my farm is.
36 Q. You lived on your farm 7 miles southwest of Muskogee?
A. I do when I am at home. I ride on Red River. Caddo is my headquarters, where I stop.
Q. You say you had known this defendant about two or three months?
A. I could not tell you how long; a month or two or three months; somewhere along there. I have forgotten, now, what time he did come there.
Q. Did you ever carry him as a posse with you?
A. Yes, sir; I have.
Q. The young man was running a store there, I believe you say?

A. Yes, sir.

Q. You saw him in the store about sundown that evening?

A. It was along about that time. It seems to me like I went in and bought something—cigars, or something—of him. I would not be positive.

Q. You didn't see him that night at the Kansas City chop-house; you just heard him?

A. No, sir; I didn't see him.

Q. You don't know whether he had any pistol or not?

A. I do not know anything about it.

Q. How do you know that he put his pistol against the door?

A. There was something sounded that way, whether it was a pistol or not.

Q. You just guessed at it by the sound. What was it you heard him tell the man about the power of attorney?

A. A. Somebody was to have the power of attorney to settle up his business—something to that effect.

Q. You would not undertake to say what he did say, would you?

A. That he would leave a power of attorney to wind up his business.

Q. That is a conclusion; you don't remember what he did say, do you?

A. That is just all that I remember.

37 Q. Is that what he said, that he was going to give him a power of attorney to wind up his business?

A. Yes, sir.

Q. Is that what he said, or is that a conclusion of what he said?

A. That is the sum and substance of what he said.

Q. Did he say when he was going to appoint the power of attorney?

A. If he said it I didn't hear it.

Q. Did he say what business he was going to have wound up?

A. No, sir.

Q. Did he say where the business was he was going to have wound up?

A. No, sir.

Q. He said he was going to kill him?

A. He said somebody had called him a damned son of a bitch, and he should not live under it.

Q. Didn't say who it was?

A. No, sir.

Q. Didn't say when it was that he said it?

A. No, sir; didn't say, or if he did I didn't hear it.

Q. What sort of cartridges were there in the pistol you found up there on Chippy Hill?

A. It was a 45 pistol it looked to me like.

Q. There are two classes of the same number, are there not?

A. This was a 45 pistol; at least I have got a 45 pistol and my cartridges——

Q. Were they short or long cartridges?

A. It has been one of these long ones——

Q. I am talking about the cartridges?

A. They were long, I think; I wouldn't say positive.

Q. What kind do you use, long or short?

A. I use short ones and some long ones.

Q. What kind did you use then, long or short?

A. I forget; sometimes I got long ones, and sometimes I got short ones.

38 Q. At that time?

A. I could not tell you.

Q. You don't know what sort they were in the pistol, long or short?

A. No, sir; I could not tell you.

Q. What did you do with the pistol?

A. I fetched it down here, and took it back and turned it over to the officer at the office there.

Q. What office?

A. The marshal's office.

Q. Here in Fort Smith?

A. No, sir; at South McAlister.

Q. Have you the pistol here?

A. No, sir.

Q. It is not here?

A. No, sir; I have not got it.

Q. Do you know whether that is the pistol Yates had before he was killed or not, the day before he was killed?

A. It is the pistol; the one that I saw was the pistol.

Q. Do you know whether the pistol you found on Chippy Hill is the one you saw Yates with the day before?

A. The one the kid found?

Q. Yes, sir.

A. Yes, sir.

Q. Are you sure of that?

A. I am pretty certain it was the pistol.

Q. You wouldn't be sure of it?

A. Yes, sir.

Q. Then why don't you tell me at the start you were. What makes you think it was?

A. The sight that is on it. This fellow didn't put on a good sight; it kind of slopes up from the muzzle to a kind of height, and the pistol had walnut handles on it in the first place, and he got these bone handles or ivory handles and put on it; he got them at Clarence Turner's hardware store; there was no screw that went through down here, and the handle of that would kind of get loose.

39 Q. Are there not plenty of other pistols just exactly that way?

A. There might be.

Q. How long have you been in the Territory?

A. I have been in there off and on ever since—I could not tell you; several years, off and on.

Q. Where did you go from?

A. I went from Arkansas.

Q. What part of Arkansas did you come from?

A. I moved from Fort Smith.

Q. Where did you come from here?

A. I came from Missouri.

Q. Did you ever live in Washington County?

A. Yes, sir.

Q. How long did you live up there?

A. Well, a year or two; I don't know how long.

Q. You were not going to try to dodge about living in Washington County?

A. No, sir; you asked me where I came from.

Q. Where did you come from when you came to Fort Smith?

A. I came from Cap. Allison's—over here in the Territory to here—and then I came from Washington County down to Cap. Allison's.

Q. Then you had been to Missouri before you lived in Washington County?

A. Yes, sir; Seligman, Missouri.

Q. Are you a man of family?

A. Yes, sir.

Q. Have you got a wife?

A. Yes, sir; I was married in 1862.

Q. Did you ever have any trouble in Washington County?

A. Yes, sir.

Q. Charged with a crime up there?

A. Yes, sir.

Q. What was it?

A. I was charged with carrying a six-shooter. We were kind of different in politics up here in that country, and—I don't know that that concerns anything at all.

Q. Not a thing in the world; you were simply charged with carrying a six-shooter?

A. Yes, sir; and indicted for it.

40 Q. That is all you were ever indicted for?

A. Yes, sir. That is all I ever done; I can prove that.

Q. You have not been back in Washington County since, have you?

A. Yes, sir.

Q. You moved away from there after that, I suppose.

A. Yes, sir. I didn't want to live up there. I have been back there several times.

Q. Have you ever lived there since that?

A. No, sir; nor I do not.

Redirect examination by the DISTRICT ATTORNEY:

Q. Your trouble there was when this excitement was up at the time that John Reed was killed?

A. Yes, sir; Willhights—probably you have heard of them.

Q. At the time of that excitement up there on West Fork?

A. Yes, sir; a little before that.

Q. When they were having those political fights; that is the time you were charged with carrying a pistol?

A. Yes, sir; Mr. Willhight indicted me.

Q. That is all they had against you, simply carrying a pistol?

A. Yes, sir; that is all they ever had me charged with. I can fetch men that knew me there and other places; I am not afraid to give my post-office address anywhere from the time I was born to the governor of West Virginia. I can prove my character wherever I have been.

41 Recross-examination:

Mr. FREDERICK. Didn't you say that that pistol was at South McAlester?

A. I took it up there; they fetched me down here before the grand jury, and I took it back to South McAlester.

Q. You did not bring it back here?

A. No, sir; I turned it over to the office.

Q. At South McAlester?

A. Yes, sir.

Redirect examination:

By the DISTRICT ATTORNEY. Is this the pistol I now hand you?

A. Yes, sir; that is the pistol.

Q. It works all right now?

A. Yes, sir.

Q. You don't know anything about that?

A. No, sir; I know it by these handles, and——

Q. Is this the belt that was found, or one like it?

A. Yes, sir; or one like it. I could not tell you about the belt; there are so many belts alike; I found this one or one like it; found a belt and a thing like this [indicating].

Q. A scabbard?

A. Yes, sir.

Q. That was empty of cartridges?

A. Yes, sir.

Q. You found this, you say, about 25 yards away?

A. Yes, sir; to the left of the trail going north.

Q. That would be west?

A. Yes, sir. The walnut handle was laid up on Mr. Gleason's shelf.

Q. He took the walnut handle off and put this on?

A. Yes, sir.

42 Recross-examination:

By Mr. FREDERICK. Is this the pistol you found?

A. Yes, sir; that is the pistol.

Q. Was it a round barrel or an eight square?

A. It was a Colt's pistol.

Q. Was the barrel a round barrel or a square barrel?

A. I never noticed the pistol close enough to tell you that.

Q. Some pistols have barrels that are round and some that are eight squares, have they not?

The DISTRICT ATTORNEY. There is no such a thing as an eight square.

Mr. FREDERICK (of counsel for defense). A hexagon or octagon?

A. I never examined the pistol close enough to say.

Q. To see whether it was a hexagon or octagon?

A. No, sir.

Q. [Showing witness pistol.] What is it?

A. I would call it a round barrel after seeing it; and after it gets here it is square; part of it is round and part of it is not. I know it because he wanted me to buy it a few times, and I wouldn't do it.

Q. You saw him buy these handles from Clarence Turner?

A. Yes, sir.

Q. Did Mr. Turner have any more of them?
A. Yes, sir; he paid $2.00 for them.
Q. Clarence Turner has a large hardware store?
A. Yes, sir. [Witness takes pistol and explains how he knows it.]
Q. What was the sight; brass, or steel, or what?
A. It looks kind of dark to me.

43 BART SALMON, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to wit:

Question. What is your name?
Answer. Bart Salmon.
Q. Where do you live?
A. I live on Red Oak.
Q. Are you a deputy marshal?
A. Yes, sir.
Q. Do you know this defendant?
A. Yes, sir.
Q. How long have you known him?
A. I hadn't seen him for a little over a year until I saw him in this court.
Q. Did you know him before the death of Yates?
A. Yes, sir.
Q. How long did you know him before that?
A. I guess maybe three or four months. Maybe a little longer; I could not say just how many months it was.
Q. Do you know how long he had been in that country?
A. I could not tell you how long he had been there; some three or four months, I guess, or maybe a little longer.
Q. How long had you been riding as a deputy in that country before that shooting?
A. About 2 years, I guess.
Q. Had you seen him in the country anywhere before that time?
A. The first time I ever saw him was at Wister Junction; he was there on his way to McAlester then.
Q. How long was that before the killing?
A. I could not say; three or four months, I reckon. Something near that. I don't know exactly how long he was at McAlester.
Q. Did you know James Yates?
A. Yes, sir.
Q. Was he a white man or an Indian?
A. Was a white man, I suppose; he looked to be.
44 Q. He passed as a white man, did he?
A. Yes, sir.
Q. He was a deputy marshal also?
A. Yes, sir.
Q. Is Yates dead or alive?
A. He is dead.
Q. On the night that he was killed please state if you saw the defendant?
A. I could not say whether it was before he was killed or not, but I saw the defendant that night after one o'clock sometime, I guess; something near 2 or halfpast one, maybe later.

Q. Where did you see him?

A. At Gleason's boarding-house?

Q. Is that the Kansas City Chop House?

A. Yes, sir.

Q. Go on and state all about it, all that he did and said when he came there.

A. The first I knew of anybody being there, somebody came in and went upstairs——

Q. You were sleeping downstairs?

A. I was sleeping downstairs in the diningroom on a pallet. Somebody came in and went upstairs. I heard them call my name, and came down stairs and called to me, the defendant did, and I went to him, and he said he wanted me pistol, and I noticed a little blood on his arm, and I asked him if he had been in a scrap, and he said that his nose had been bleeding, and about that time this fellow Bill Haws—I have learned his name since—Bill is all I knew then.

Q. What was his business?

A. He sometimes stayed in the defendant's little store there. He came into the door, and the defendant struck the pistol out, jerked it out from behind him somewhere, I don't know whether he got it in his pants or not, but he brought it out and throwed it down on him. As he turned around I touched him on the back——

Q. What did he say to the man when he throwed his pistol on him?

A. I don't know that he said a word to him; I don't think
45 he did. He threw his pistol down on him, and as he turned I seen a big spot of blood between the shoulders, and I touched him on the back, and he turned around and threw the pistol on me, and I says, "Marshal, you don't want to shoot me." And as well as I remember he says, "No, you are my friend," or I said "I am your friend." I could not say just exactly which way it was then, but it was something near that way, and he said, "I want your pistol" then.

Q. He again said he wanted your pistol?

A. Yes, sir; I told him it was in the front room, and he went back where the pallet was, where I was sleeping, and picked it up. I told him it was in the front room, I thought maybe he would go in there after it, and that would give me a chance for it myself. That was my idea for telling him to go in the front room, but he did not do that; he went back and picked it up where it was lying by the pallet.

Q. Then what occurred?

A. He then took the scabbard off the belt and taken what cartridges there was.

Q. Took the scabbard off of your belt?

A. Yes, sir; and left the belt there and took the scabbard with him, and took the pistol.

Q. What was he talking about when he was there?

A. He was talking about killing somebody; he said that a fellow had hit him over the head and called him a son of a bitch, and he was going to kill him, going to kill him that night. He talked on, I could not say all that he did say. He had a knife, as well as I remember, around his ankle in its scabbard, as well as I could see it, and he said he would have killed him with his knife if he could have got to it there, and talked

about taking a pistol away from Yates and giving it back to him—but he didn't say Yates; he said he took a pistol away from him; he never did state who he had been scrapping with; he didn't call the man's name.

46 Q. How did he carry the knife?

A. The knife was about his ankle someway, I could not see; I noticed it was in his scabbard.

Q. Did he show it to you?

A. He pulled his pants up like that, and said, "If I could have got to my knife I would have killed him when I was out there," or "when he hit me," or something like that.

Q. Did he say anything about sending your pistol back to you?

A. Yes, sir; as he went out. Before he said he would send the pistol back he said he would give this Bill power of attorney to wind up his business there; that he was going to leave that country that night, and for me to telegraph——

Q. That who was going to leave?

A. That he himself was going to leave that night.

Q. Had he told you that he was going to kill him before he said he was going to leave?

A. He said he was going to kill him that night; yes, sir. As he went out he said something about giving Haws a power of attorney to wind up his business; that he was going to leave.

Q. Did he say where he was going?

A. No, sir; he didn't say; he said he was going to leave. Then as he started off he said, "I will send this pistol back to you," and I says, "I have got one of yours about as good," something like that, and he said, "I guess we are about even up, then," and he went on, and I never saw him any more until I saw him in the court room here yesterday or day before yesterday.

Q. This defendant is the man, is it?

A. Yes, sir; he is the man.

Q. Let me see if I understand you now. You first heard somebody go upstairs?

A. Yes, sir.

Q. Did you hear him come down?

47 A. Yes, sir; I hadn't been asleep; it was late, but I hadn't been asleep. He called me to him, and he asked me for my pistol; he said he wanted my pistol, and I noticed blood on his arm.

Q. You asked him if he had a scrap?

A. Yes, sir; and this fellow Haws came in at the door about that time; he told me that he had not been in a scrap, his nose had been bleeding—no, he didn't say whether had been in a scrap or not, but said his nose had been bleeding.

Q. Where was Depew?

A. He was in the room two or three steps from where he was standing.

Q. Did anything occur between him and Depew?

A. Depew started to open the door, and the defendant here struck the door with the muzzle of his pistol and said to him, "Don't you come out here."

Q. Did Depew come?

A. No, sir; he didn't come out until after.

Q. Did he say why he was going to kill that man? I believe you have already said that he said he called him a son of a bitch, and struck him over the head.

A. Yes, sir; he said he hit him over the head with a pistol and called him a son of a bitch, and he said he would kill anybody for that.

Q. Did he say when he was going to leave?

A. He said he was going to leave that night.

Q. Going to kill him before morning?

A. Going to kill him and leave, as I understood it; he didn't state no man's name. I asked him who he was going to kill, and he said he would not tell me, that I would find out in the morning.

Q. Did you find out in the morning?

A. Yes, sir.

Q. Who did you find to be killed?

A. Jim Yates.

Q. How did you find out?

A. Dad Yandell came down there and waked me and Depew up and told us that Lou. said Marshal had killed Yates and wanted some-
48 body to come out there and take care of him, and I went to where my brother, John Salmon, was and George Williams, and waked them up, and Depew went up to Jack Ellis's.

Q. You went over to your brother John's?

A. Yes, sir.

Q. Then where did you go?

A. We went up there to where Jim Yates was.

Q. Where was it?

A. It was about three-quarters of a mile, out on what they call Chippy Hill.

Q. In what direction from South McAlester?

A. I think it would be northeast, or maybe—I don't know which direction is north.

Q. How far from the railroad?

A. Oh, it is a quarter of a mile, or a half, I reckon.

Q. East of the railroad?

A. Yes, sir.

Q. On the road leading to Old McAlester?

A. No, sir; it is off to the right of the road; it is known as Chippy Hill; everybody knows it.

Q. About three-quarters of a mile from town?

A. Yes, sir.

Q. You went out there and you found who?

A. Found Jim Yates laying there in the edge of the road.

Q. How was he lying?

A. On his back.

Q. Alive or dead?

A. He was dead. And we picked him up and carried him into the house.

Q. Did you notice any wounds upon him?

A. I noticed some blood here on his shoulder like; I didn't examine the flesh to see where the ball went in; I never examined that.

Q. Were you present when the pistol was found?

A. No, sir.

Q. Did you know Yates's pistol?

A. Yes, sir; I have seen his pistol. Me and him and the defendant was out before that at what is known as the Salt Well shooting
49 around there at one time, and I have been off with Jim Yates, down on the Frisco, a trip or two.

Q. Did you see anything of it that day?

A. No, sir; I hadn't seen the pistol for probably a week after that time. The first I saw of it was Mr. Lindley's house.

Q. Who brought the pistol here?

A. I brought it here.

Q. Where did you get it?

A. I got it from Lindley and brought it down where I lived, or John got it and brought it down there; we both live in Red Oak. I got it from him.

Q. When you got it was there anything the matter with it?

A. It wouldn't revolve.

Q. What was the matter with it?

A. The revolving spring was out of it.

Q. See if the pistol I now hand you is the pistol?

A. Yes, sir; that is the pistol.

Q. You say when you got it a week afterwards it would not revolve?

A. It was over a week; I saw it laying there, and didn't pick it up or carry it away.

Q. When you got it it would not revolve?

A. No, sir.

Q. You didn't see it that morning?

A. No, sir; two weeks before Jim was killed I saw him at Wister Junction, and I never saw him again until I saw him dead the morning of the 4th, as well as I remember.

Q. I am talking about when you saw this pistol.

A. It was two weeks before Jim Yates was killed I saw him at Wister Junction.

Q. I am talking about after he was killed.

A. I saw it in about a week afterwards in Mr. Yandall's house. After that time I could not say what time it was John got it and brought it down to Red Oak. I put a new spring into it and I have had it ever since.

Q. Is this the defendant's pistol?

50 A. Yes, sir; that is the pistol he had when I saw him last.

Q. You found the man up there and he was dead?

A. Yes, sir.

Q. When had you last seen him before you found him there dead?

A. I saw him about two weeks before, as well as I remember, at Wister Junction.

Q. You didn't see him that day, the day before the night he was killed?

A. No, sir; I got in McAlister that evening; I had been working for the Choctaw Railroad Company, staying there at the mines, and I quit them on the third, and that is how come me to remember it. I went in on the evening of the third, and on the morning of the 4th is when Dad Yandell came down there and said Jim Yates was killed.

Q. This Bill—what is his name?

A. I have learned his name was Haws since; I did n't know his name at that time only by Bill.

Q. He had been working for the defendant?

A. I could not say whether he had him hired or not, but when he would be away I saw Haws in there, and he seemed to be helping him around there.

Q. He is the man that he wanted to wind up his business for him?

A. Yes, sir.

Q. Do you know whether he did wind up his business or not?

A. I could not say whether he wound it up or not. I think that the defendant's father came out there; I know that he was there.

Q. Do you know what became of the defendant?

A. I never saw him any more after he stepped out of that door that night with these two pistols.

Q. He had two pistols?

A. Yes, sir; the pistol that he drew on me and the one he got from me.

Q. What kind of a pistol was it that he drew on you?

51 A. It was a white handled pistol.

Q. Was it as large as this pistol I have here?

A. About the size of that.

Q. What kind was yours?

A. Rubber handle, Colt's .45.

Q. As large a pistol as this one?

A. About the size of that one; the handle was rubber.

Q. When he walked out of the place he had two pistols?

A. Yes, sir.

Q. Was you pistol loaded?

A. Yes, sir; it was loaded when he got it.

Q. All around?

A. I think there was one empty chamber. I always carry a pistol that way.

Q. Why do you do that?

A. I think it is safer.

Q. You carry one empty chamber that the hammer is down on?

A. Yes, sir; I don't think there is as much danger that way.

Q. I will ask you if it is not customary for deputy marshals to carry their pistols that way?

A. Yes, sir; I have seen several of them carry it that way.

Q. Neither hull or load in that chamber?

A. I never would leave hulls in my pistol; I don't know whether the others would or not.

Q. After the defendant left you there that night you may state what you did.

A. Dad Depew, he got up and come out, and nothing would do but that I would go with him, and I got up and started with him, and got about half way up there, and I told him I would not go any further unless he would give me his pistol; he would not go that, and I told him I wouldn't go any further without a gun up there; that if he would give me his gun I would go up there by myself; and he wouldn't do that, and I went back and went to bed.

52 Q. Did you hear any shooting?

A. I heard some shooting just about the time or a little after we left the house, I could not say which it was. I heard some shots before the defendant came down there, some four or five shots.

Q. I am speaking about afterwards.

A. I heard some; I could not; 15 or 20 shots, I reckon, something like that.

Q. How long after he left was it before you heard the shooting?

A. I could not say just how long it was; it was some 15 or 20 minutes, probably, after he left.

Q. In what direction was it you heard the shooting?

A. In the direction where Jim Yates was found the next morning dead.

Q. In what direction did the defendant go when he left your place?

A. I saw him in the room; he went out of the door on the south side of the house, I suppose it is; I didn't see him after he got out of the door.

Q. You don't know which road he took?

A. No, sir; I couldn't say about that.

Q. While you were out doors did you hear any shots fired?

A. About the time we stepped out, or after, I could not say which it was, we heard 15 or 20 shots in that direction.

Q. Up in that way?

A. Yes, sir.

Q. Of course you don't know who was shooting?

A. No, sir.

Q. Did they all seem to be at one place or some here and some there?

A. They seemed to be up in about the same place where the shooting was; I couldn't say; they might have been 100 yards apart, something like that. You could not tell in three-quarters of a mile.

Q. Did you find anybody else hurt or shot when you went up there?

53 A. No, sir; I didn't see any one else that was hurt there but Yates, and he was dead.

Q. You say you never saw the defendant any more until you saw him yesterday?

A. No, sir.

Q. What name did he go by up there?

A. Robert Marshal is the only name I knew for him.

Q. Do you know what his real name is?

A. They say his real name is Robert Marshall Hall.

Q. Did you ever hear him called Hall up there before?

A. No, sir; I never heard him called Hall.

Q. What was his business house called?

A. I don't know what his billheads was; I heard it always called Robert Marshall's store.

Q. You never heard any other name until after he was arrested?

A. I heard him say that Hall was his partner down in Mississippi, I believe.

Q. A man named Hall was a partner in Mississippi?

A. Yes, sir.

Q. Did you learn that he had come from Mississippi before coming there?

A. Yes, sir.

Q. From him?

A. Yes, sir.

Q. Did he tell you what part of Mississippi he came from?

A. I don't believe he did. I think he told me that he belonged in Mississippi, as well as I remember. I was with him a great deal around there, and I could not say what all we didn't talk about, as far as that is concerned.

Q. Were you and he friendly at that time?

A. Yes, sir; as far as I know we had always been good friends, ever since he had come down there.

Q. You had been with him a great deal?

A. Yes, sir; I had been with him right smart. He went out to
54 Krebbs with me and Dad Depew one trip, and then I would be around his little store there; lots of times talking with him. If he ever had any hard feelings at me I did not know it. I know I never had any at him.

Q. You think it was about 1 o'clock when he came there?

A. I know most it was. I looked after he left at my watch and it was 2 o'clock.

Q. How long was he there at the Kansas City chop house?

A. I could not say just how long he was there; might have been 15 or 20 minutes, or maybe not quite so long. He was there long enough to talk right smart. He seemed to be a great deal unnerved after he pulled the pistol out of his pants, back here?

Q. Do you know whose pistol it was that he had there?

A. I could not say, only it looked like the livery man's pistol up there.

Q. What is his name?

A. Jim Beeman; I didn't know his name at that time.

Q. Did you see any arms on him, except the pistol and knife?

A. Nothing but the knife.

Q. Did he take that knife away with him?

A. I guess he did.

Q. Did he leave it there?

A. No, sir; I didn't see it any more.

Q. He left with two pistols and a knife on him; how did he carry the pistols when he left?

A. He had the pistols on the belt; mine was a left-handed scabbard, and he put that on his belt, too.

A. He already had a belt on, did he?

A. I believe he had a belt when he came there, as well as I recollect.

Q. Then he put your pistol on the left-hand side?

A. Yes, sir; he put my scabbard there; I am left-handed.

Q. So he had a pistol for each hand?

A. I could not say whether he had the other pistol in his belt
55 or not, but he put the scabbard on the belt, I know.

Q. Tell me what kind of a knife that was?

A. That was a knife about that long (indicating about 4 inches).

Q. With a guard on it?

A. Yes, sir.

Q. Both edges sharp?

A. Yes, sir; came to a point; I had seen the knife before in his store, is how come me to know what kind of a knife it was. It looked to be the same knife that night.

Q. Did it run out to a point?

A. Yes, sir.

Q. A kind of a dagger, then?

A. Yes, sir.

Q. How come him to show you the knife at that time?

A. I don't know what made him show me the knife. He 'lowed he would have killed him with the knife if he could have got to it.

Q. Did he give you any reasons why he could not get to it?

A. Well, as well as I remember I think he said that Jim jerked his pistol on him, and he grabbed the pistol, and took it away from him, and he gave it back to him, and got in good humor, or something of the kind; settled the row and he gave it back to him.

Q. That is, before he came down there they had had a row and had settled it?

A. Yes, sir.

Q. And he was talking about it at the time, that he would have killed him with his knife if he could have gotten to it, but he did not have time?

A. Yes, sir; something that way; I don't know just how it was now.

Q. You say you heard some shots fired before that?

A. Yes, sir; there was four or five I guess, about that many.

Q. You don't know who shot them?

A. No, sir; I heard them fired; I was laying on the pallet at that time.

Q. Do you know whether your pistol that he had was loaded or not—could you tell?

56 A. I don't know whether it was loaded or not; I think he put some loads in the pistol; he was fooling with the cartridges and the belt and the pistol, and he seemed that he didn't want me to get hold of him no way, sort of stood around to keep me away from getting hold of him if I wanted to; I suppose that is what he aimed.

Q. You say that he put some loads in the other pistol?

A. I think he did; he had the belt there——

Q. You say that you think he did; where did he get the cartridges to put in it?

A. He got them out of my belt, and just left my belt there and taken my scabbard.

Q. Did he leave any cartridges in your belt?

A. No, sir; I don't think there was one in it.

Q. How many was in it before he went to it?

A. I don't know how many was in it. I might have had half a dozen or maybe more.

Q. He took them all?

A. Yes, sir.

Q. Your pistol was already loaded?

A. Yes, sir; had five loads in it.

Q. What time was it that you went up and found Yates's body?

A. About daylight, a little after daylight when I got up there.

Q. You looked at your watch and know it was 2:00 o'clock just after he left?

A. Yes, sir; I can testify to that by my watch.

The COURT. How long after he left was it before you heard the shooting up there?

A. It might have been fifteen or twenty minutes, something near that. I put my clothes on. Dad was up and trying to get me to go and I didn't want to go up there.

The DISTRICT ATTORNEY. That is not the question you were asked. You were asked how long it was?

A. I have stated as near as I can.

The DISTRICT ATTORNEY. I want to show by the almanac that the sun on the fourth day of August, 1891, rose in the lattitude of
57 Pittsburgh, at 5:00 o'clock, and in the latitude of New Orleans at 5:30.

Q. It was about daylight when you got down there and found the dead body?

A. Yes, sir.

Q. Was the body cold, stiff, or warm yet?

A. It was cold; I do not think it was stiff yet. I noticed when we carried it in the house it was somewhat limber.

Q. When you picked it up you noticed that it was cold?

A. Yes, sir.

Q. You did not notice the wounds?

A. No, sir; I didn't examine the flesh; I noticed a little blood on his shirt; they told me that he was shot in the shoulder and left breast.

Q. Did you see the doctor when he was probing the wounds?

A. No, sir; I left on the Choctaw road; came down the road that morning.

Q. Was your brother John there?

A. Yes, sir; he went out with the doctor and saw him, and he and the doctor left South McAlester together.

Cross-examination by Mr. FREDERICK:

Q. You had known Robert for three or four months?

A. Yes, sir.

Q. He run a grocery store there?

A. Yes, sir.

Q. You were with him a great deal?

A. Yes, sir; I have been with him right smart whenever I was at town.

Q. He went with you and Depew at one time as posse?

A. He went with us down to Krebs, yes, sir.

58 Q. He went on the trip as an officer with you?

A. Yes, sir.

Q. He went as posse, did he?

A. Yes, sir: we asked him to go down with us, and he went down; of course, we aimed to use him that way.

Q. When was that?

A. I could not say just when that was; I did not keep any dates, and I could not tell you.

Q. Did he ever go with you at any other time? Did you ever ask him to go with you at any other time than that?

A. Yes, sir; he was out one time at a picnic; I remember that he went out with me.

Q. Did he ever go with you to Chippy Hill?

A. It was past Chippy Hill to the picnic ground. One night me and him went out there. There was another time that I remember now, the time that me and Jim Yates and John Salmon and Robert, we got him to go along that night out on Chippy Hill; there was a fellow came down to town and said there was four fellows out there with leggins on with pistols just taking the place, and wanted somebody to go up there; and me and John Salmon and Jim Yates and the defendant went up to the place together, and found they were Indian officers and posses and one thing and another, and we just let them go then.

Q. You asked him to go with you?

A. Yes, sir; certainly. He went along with us to help arrest them, if necessary.

Q. How long had you known Jim Yates?

A. I knew Jim longer than I had this man. I had seen him I guess for a year at different times before this killing.

Q. How long had Jim been a deputy marshal?

A. I could not tell just how long it was. I don't know whether he was a marshal or a posse the first time I ever saw him. He worked around the court ever since I knew him.

Q. Had you seen Robert that evening before he came into your room?

59 A. Yes, sir; I came by his little store that evening; he called and told me—I reckon I will have to tell how the whole thing was: He had a big pistol, Colt's 44, and I had a little pocket pistol, a 38 Colt's, and Robert there wanted a smalier pistol and wanted me to take the large one and let him have the small one. The small one had the spring broke in it, and he took it over to Old Town to get it fixed, and that evening I came by there he told me that he wanted his big pistol back; he said that he could not get that one fixed. I told him that I had let the baggage man have it on the Choctaw road, and I would get it the next morning and give it to him.

Q. That is how you come to have Robert's pistol?

A. Yes, sir.

Q. He got yours that night and said you would be even up; he had yours and you had his?

A. Yes, sir.

Q. You say when Roberts came there he seemed to be very much excited, unnerved?

A. Not when he first came in; when he first pulled his pistol.

Q. When he first came in he did not seem to be excited?

A. No, sir.

Q. Did he seem to be when he left?

A. I don't know that he was excited; he seemed to be unnerved somewhat.

Q. He told you that somebody hit him over the head with the pistol?
A. Yes, sir.
Q. He didn't tell you who it was?
A. No, sir; I asked him, and he said he wouldn't tell me—"You will find out in the morning."
Q. You say you noticed blood on his clothes?
A. Yes, sir; I noticed on one of his arms and a big spot of blood between his shoulders.
Q. How was he dressed?
A. He had a white shirt on, no vest or coat.
Q. How far was that from his store?
60 A. It was only a short distance, 30 or 40 steps, I reckon, as near as I can guess at it.
The DISTRICT ATTORNEY. That was the Kansas City chop house where you were?
A. Yes, sir.
Mr. FREDERICK (of counsel for defendant). Where did he sleep at night?
A. He slept in the store at that time.
Q. His bed-room was in the store?
A. Yes, sir.
Q. Where did he keep his clothes; in the bed-room?
A. I could not say where he kept his clothes; I suppose he kept them there.
Q. After he left how long was it before you and Depew got up and put on your clothes?
A. As soon as he left Dad came out there and wanted me to go with him, and I didn't care much about going with him. I had no gun, and I didn't know what he had done or whether he had done anything or not.
Q. How long was it until you did start?
A. I could not say; 15 minutes; may be 20; you know it is hard for a man to tell just the exact time. As near as I can guess at it it was about that.
Q. How far did you go?
A. We went up pretty near half way; something like that.
Q. Did you go up as far as the stable?
A. Yes, sir; we went up as far as the stable.
Q. About as far as the stable?
A. Yes, sir.
Y. Did you pass the stable?
A. I don't know; you see we went over on the other side of the railroad like.
Q. You crossed over on the west side of the road?
A. Yes, sir; we were on the west side when I told Dad I wouldn't go any further unless he would give me his gun.
Q. You started over on the west side of the road; would that be the way to North McAlester?
61 A. Right up the railroad, or right along the side of it is a wagon road; a footman can go up the railroad.
Q. Had you started up toward Old McAlester?
A. No, sir; we had started in order to go out on the hill.
Q. There are several hills out there; which one do you mean?

A. Chippy Hill, where he was killed.

Q. There is a large hill between that place and South McAlester?

A. Yes, sir; the stable is on a hill as to that matter.

Q. You didn't go by the stable at all?

A. No, sir; I didn't go about it.

Q. Did you cross the railroad below the stable?

A. Yes, sir; south of the stable, I think; as well as I remember we crossed there back of some nigger dives just before we got to the stable.

Q. You got over on the other side of the railroad?

A. Yes, sir; I could not say just where we crossed. I know we were on the west side of the road.

Q. That would not be going toward Chippy Hill would it?

A. You can go down on the other side of the railroad there. We would be out of the way where we could see people, and they couldn't run on to us; that is what we went over there for.

Q. You didn't know that any trouble was at Chippy Hill?

A. That is where we heard the shooting after Robert left.

Q. That is three-quarters of a mile away?

A. Yes, sir.

Q. There is a considerable of timber between South McAlester and Chippy Hills, isn't there?

A. Yes, sir; there is a right smart of timber there.

Q. The ridge that the timber is on is higher than the ground that Chippy Hill is on?

A. I believe it is.

62 Q. You could not be certain which way you heard the shots, could you?

A. It was over towards that Chippy Hill, about there somewhere. I could not tell just where it was at.

Q. You heard 15 or 20 shots?

A. Yes, sir; seemed like that as near as I can remember.

Q. How were they fired, like a volley of shots?

A. Yes, sir; shots a shooting. I could not tell you whether——They were all shot at once; they were shot along pretty fast though.

Q. Before this you had heard several shots?

A. I heard four or five shots before Robert came where I was.

Q. You came back and went to bed; did you go to sleep?

A. Yes, sir; I had been asleep when I was woke up in the morning.

Q. What time did you wake up in the morning?

A. It was early; Dad Yandell came and woke me up.

Q. Was it daylight, or had day broke?

A. You could tell day was coming; yes, sir.

Q. Then you went up there?

A. Yes, sir; I went up and waked up George Williams and John Soloman, and started up there.

Q. When you got up there it was daylight?

A. Yes, sir; we could see the man very well in the road. We picked him up and carried him in the house.

Q. You think this pistol here is the pistol you say Yates with 2 weeks before at Wister Junction?

A. I am satisfied it is. Those handles are a pair of handles that Yates said he bought in Muskogee.

Q. But there are a number of those kind of handles, are there not?

A. I don't know whether there are a number or not. I have seen the pistol, and have had it and had it before this killing took place, and
63 as to that matter that defendant can tell you that is the pistol that he saw him carrying. The revolving spring was broken in it.

Q. How many pistols did Yates have? You did not know, for you had not seen him for two weeks.

A. I hadn't seen him for two weeks. I had been with him a good deal before that. We had made one trip or two trips down on the Frisco together, and I would see him there in McAlester, and I saw his pistol too.

Q. Did the defendant say he was going to give, or would give, or had given, a power of attorney to wind up his business?

A. He said he would do that. He asked me if that would be sufficient, and I told him I reckoned it was.

Q. He said he was going to leave?

A. Yes, sir.

Q. He might send your pistol back?

A. Yes, sir; he said he might send it back. I told him that I had one of his, and I guessed we would be about even up.

Q. Did he send it back to you?

A. No, sir.

Q. You still have his?

A No, sir; I haven't got it now; I did have it, but not now.

Q. You think that was about 1:00 o'clock that he was at your room?

A. It was a little after one, I reckon, that he was there; I could not say because I didn't look at my watch until after he had left; it was 2 o'clock then.

64 JOHN SALMON, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to-wit:

Q. Your name is John Salmon?

A. Yes, sir.

Q. Are you a brother to Bart Salmon?

A. Yes, sir.

Q. You are a deputy marshal, are you not?

A. Yes, sir.

Q. Of the Muskogee court?

A. Yes, sir.

Q. Were you a deputy marshal for the Muskogee court or this court at the time that Yates was killed?

A. I was a deputy marshal for the Muskogee court.

Q. Where were you at the time that he was killed—the night of the killing?

A. Me and Mr. Williams was sleeping at Mr. Lindlay's house, the chief deputy of our court at South McAlester.

Q. When did you first learn that there was any trouble?

A. It must have been between three and four o'clock in the morning when my brother, Bart Salmon, came and woke me up and told me that Marshal had killed Yates, and wanted me to go up there with him.

Q. Did you go?
A. Yes, sir.
Q. Where did you go?
A. We went, I suppose, about three-quarters of a mile out to what is known as Chippy Hill up there.
Q. State what you found.
A. We found Mr. Yates laying by the side of the path, dead.
Q. Was there any wounds on him?
A. Yes, sir; one shot in the shoulder, and neck here, and one in the left nipple, as well as I remember.
Q. Did that ball go through?
65 A. I never noticed; I went back and got Dr. Lowry to go up and look at the wounds.
Q. You knew Yates?
A. Yes, sir.
Q. Was he a white man or 'n Indian?
A. Yes, sir; he was a white man.
Q. State everything that you found there and around there.
A. We carried him down to the next house, it wasn't very far, about 100 or 150 yards, to a lady's house named Lulu, and then laid him out down there.
Q. How about the body; how were the pockets?
A. His pistol was gone, the belt and scabbard, and his pockets turned wrong side out.
Q. What pockets?
A. His pants pockets.
Q. Both of them?
A. As well as I remember both of them were turned inside out.
Q. Was there anybody there at the time?
A. We met George Perry. It seems that he had been to another house above; he said——
Q. You need not tell what he said; but you found Perry there?
A. Yes, sir; he came up.
Q. Where did he come from?
A. I suppose when I first noticed—there is a little grove between the houses, and he was coming down the path. There is a kind of trail way went from one house to another.
Q. Was the pistol found and the belt?
A. I didn't see them find it. They found it while I was gone after the——
Q. Did you see it afterwards?
A. Yes, sir.
Q. Where did you see it?
A. I saw it there when I came back from going after Dr. Lowry.
Q. What was its condition?
66 A. There was no cartridges in the belt and the pistol would not revolve at all.
Q. Was there any cartridges in the pistol?
A. As well as I remember there was five loads in it, and one chamber was empty.
Q. Did you know Yates' pistol?

A. Yes, sir.
Q. Is this it?
A. Yes, sir; that is it.
Q. You have seen that in my office?
A. Yes, sir.
Q. This is the same pistol?
A. Yes, sir; I have seen it since that time.
Q. Who brought the pistol here?
A. Bart Salmon brought the pistol here.
Q. What did you do with the body?
A. We took it down to the woman's house, named Lulu, and the doctor looked at it, and we buried it then.
Q. Did you see the doctor probe the wounds?
A. Yes, sir; he pronounced both wounds fatal.
Q. When you examined the pistol please state if it had the appearance of being recently fired.
A. I didn't notice particularly; there was five loads in it, but the empty chamber had no shell in it at all.
Q. When had you seen the defendant last before that?
A. I saw him that evening when I got off the train.
Q. Where was he?
A. At South McAlester.
Q. Did you ever see him afterwards until he was arrested and brought here?
A. Yes, sir; I saw him in jail one day.
Q. But not until after he was arrested?
A. No, sir; not until after he was arrested.
Q. Do you know where his business house was?
A. Yes, sir.
Q. How large a place was that?
A. I could not tell you exactly; it is a small business house.
67 Q. You were not at the same boarding house your brother was at, the same eating house?
A. No, sir; I was sleeping at Mr. Lindell's dwelling house.
Q. Did you hear any shots fired during the night?
A. No, sir; me and Mr. George Williams was sleeping together.
Q. How far from Lulu's house did you find this man?
A. I suppose it wasn't over 100 yards, I don't think; I never paid any particular attention to it. I suppose the houses were about a quarter apart.
Q. What houses?
A. There was another house up on the hill; I don't know whose house it was. There was a chippy lived in it, I suppose.
Q. What did Lou do? What kind of a house did she keep?
A. House of ill fame, I guess.
Q. Chippy Hill gets its name from that, from the bawdy houses?
A. Yes, sir.
Q. Do you remember when it was that this killing occurred, when it was that you went up there?
A. It was in August, I think, as well as I remember; I would not be positive, for it has been so long, and I never taken no note of it.

Cross-examination by Mr. C. J. FREDERICK:

You say that Chippy Hill got its name from boarding houses?

A. No, sir; bawdy houses.

Q. There is not a boarding house up there, is it?

A. No, sir; you don't understand me that way at all.

Q. Bawdy houses, a whole lot of them up there?

A. Yes, sir.

Q. About six of them, isn't there?

68 A. I don't know how many there is of them.

Q. Standing off about 100 yards apart are they not?

A. Some of them is further than that.

Q. Isn't there two rows of them, three in each row?

A. They are scattered all around all over the hill there. The name they always had for them was chippy houses.

Q. And the hill became Chippy Hill?

A. Yes, sir. I have been up there several times, but I didn't happen to be there the night the killing occurred.

Q. It was a good place for deputy marshals to go, was it not?

A. Well, I don't know.

Q. Yates was a deputy marshal?

A. Yes, sir. It is owing to how much money he has got whether it is a good place to go or not.

Q. It is a cash market, is it not? (No response.)

Q. How far do you think the chippy houses are apart?

A. This house where Yates came from where he got killed, I suppose they are 2 or 3 or 400 yards apart; I could not tell you positive; I never thought about having to be down here as a witness; somewheres along in that neighborhood.

69 Mr. MITCHELL, after having been duly sworn, was placed upon the stand to be examined by the district attorney, when the following proceedings were had, to wit:

The DISTRICT ATTORNEY. I have a witness here that was not before the grand jury, and there has been no notice served upon the other side. He is a witness I telegraphed for yesterday to come and he arrived today. I offer to prove by him the amount of money that was upon the deceased on the evening before he was killed. I offer him now upon the ground that he has been discovered since the examination before the grand jury.

Mr. FREDERICK. We object to it. We have not been served of notice, and we therefore have had no opportunity of preparing to meet this testimony. I suppose the object of the law of having notices served is for the purpose of the defendant ascertaining what tha' testimony is that he may have an opportunity to explain it if explanation is necessary. Hence we object to it.

(Objection sustained.)

70 The DISTRICT ATTORNEY. I want to introduce the writ of Judge Niles, for the southern district of Mississippi, showing that the defe'dant was arrested in Mississippi and sent here from there by him.

Mr. FREDERICK (of counsel for defendant). We object to it. Our objection is that it neither tends to prove or disprove the issue where the defendant was arrested.

The COURT. The fact that he left the country is a relevant fact. If he was arrested in a distant State that would be a fact tending to show that he left there.

The DISTRICT ATTORNEY. I have already proved that he intended to leave; that he said that he would leave when he got the pistol; that he said that he intended to leave that night after killing the man, and he was making arrangements to give a power of attorney to some one to transact his business. I have shown that he was never seen there since, and if we show that he was arrested in Mississippi that clearly shows flight.

The COURT. Yes; I think so.

(Defendant excepts.)

The writ was here read to the jury by the district attorney, and is as follows to wit:

"(Copy.)"

"*The United States of America to the marshal of the southern district of Mississippi:*

It appearing to me that Robert Marshall Hall has been duly committed by R. H. Winter, a commissioner of the circuit court for the southern district of Mississippi, upon a charge of murder on an indictment
71 from the circuit court of the United States for the western district of Arkansas,

You are therefore hereby commanded to take the body of the said Robert Marshal Hall and deliver him into the custody of the marshal of the United States for the said western district of Arkansas, to be there dealt with according to law; and do you then and there make return of this writ into the clerk's office of the said southern district of Mississippi.

In testimony whereof I have hereunto set my hand and the seal of the said district court for the southern district of Mississippi, this the 2nd day of March, A. D. 1892, and of the independence of the United States the one hundred and sixteenth.

(Signed.) HENRY C. MILES,
[SEAL.] *U. S. Judge.*

On the back of the same is the following: "Copy. United States v. Robert Marshall Hall. Order for removal of prisoner to the western dist. of Ark. Received Mch. 2, 1892. Fred. W. Collins, U. S. Marshal."

Here court adjourned until Monday morning, August 15th, 1892, 8:30, o'clock.

72 MONDAY MORNING, *August 15th, 9:00 o'clock.*

JAMES FREE, having been duly sworn upon behalf of the Government was examined by the district attorney, and testified as follows, to-wit:

Q. What is your name?
A. James Free.
Q. Where do you live?
A. I live at Leehigh now.
Q. Where did you live last August?
A. South McAlester.

A. I expect he did.

Q. Yates bet a dollar and a half, and the defendant said, "I only bet what I have before me?"

A. I believe he said he wouldn't play any more than he just had in front of him.

Q. That is, the money?

A. Yes, sir.

Q. And then Yates said—the one you call Jim—go ahead, and state what he said.

A. He said, "You have got the money." He says, "Play your money."

Q. Then what?

A. Bob said, I believe he said, "If them under the table plays I will just go down and get them," or something like that.

Q. Was that before or after Yates had told him to play what was under the table?

A. That was after Yates had told him that.

Q. I don't know whether I quite understand you exactly or not. They drew their hands and Yates bet a dollar and a half, and the defendant said, "I only bet what I have got before me?"

A. Yes, sir.

Q. And Yates said, "You have got the money; go on and bet?"

A. He said, "You have got the money in your pocket; go on and play your money."

Q. When was it that Yates called his attention to the fact that he had dropped his cards under the table?

A. I can not recollect now whether he discarded his cards before that or after that; I can't remember that.

Q. At any rate he told him to play what was under the table?

Yes, sir; he said, "Them under the table plays too."

76 Q. The defendant said, "If those under the tables plays——"

A. He says, "I will go down and get them."

Q. What did he do then?

A. He went down, and I think that he tried to get his knife; he had his knife in his shoe.

Q. Did he have his knife in his shoe?

A. Yes, sir; he put one there that evening in the store. I expect he had it there then.

Q. Did you see him put his knife in his shoe?

A. Yes, sir.

Q. Did Yates know that he had it there?

A. Yes, sir.

Q. Was Yates present when he put it there?

A. No, sir; I do not think he was.

Q. Did you say that you saw him put his knife in his shoe?

A. Yes, sir.

Q. Where was that?

A. That was at South McAlester.

Q. Before you went up on the hill?

A. Yes, sir.

Q. What kind of a knife was it?

A. I don't know what sort of a knife you would call it. It was a knife I expect about that long (indicating about 8 inches), and it was put in a scabbard.

Q. Scabbard knife, was it?

A. Yes, sir.

Q. When the defendant said, "If they play I will go down and get them," he reached down, and what did Yates do then?

A. He pulled his gun out.

Q. His pistol?

A. Yes, sir.

Q. Then what?

A. Hall grabbed the gun and they commenced tussleing, and I didn't stop to se' any more of it; I went out of the window.

Q. Was Lulu there?

A. No, sir.

Q. You went out of the window?

A. Yes, sir.

Q. Go on and state what occurred after that?

77 A. I came around to the front of the door and they had quit tussleing in there, and Hall picked up the lamp and started to throw it towards me, but didn't throw it. He picked up the lamp and said, "Don't you come in here."

Q. Made a motion as if to throw it?

A. He picked it up; didn't make any motion or anything.

Q. They were in the house then; had quit tussleing?

A. I believe they had quit tussleing then.

Q. He told you not to come in?

A. Yes, sir.

Q. Go ahead.

A. They come outside then.

Q. Both of them?

A. Yes, sir; Jim had his gun in his hand, and he had his arm raised, and had the gun pointed at him just like that, and he said, "You damned son of a bitch——."

Q. How was the defendant?

A. Standing in front of him.

Q. How was his hands?

A. Had them behind him, this way.

Q. Do you know whether he had his knife in his hands at that time?

A. He had something in his hands; I could not say what it was.

Q. Go on and state what was said.

A. Jim said, "You damned son of a bitch. you have cut me."

Q. That is, Yates spoke that to the defendant?

A. Yes, sir.

Q. What did he say?

A. He says, "You damned cock sucking son of a bitch, you have cut me over the eye, and I have got a damned good notion to kill you."

Q. Did you notice whether he had anything the matter with him at that time?

A. He had a sort of bruise over the top of his eye, and under here too, but I forget which eye it was.

Q. Go ahead.

78 A. Hal said, I don't like to take that "—I forget just what he said. He said that they had always been friends and he hated for him to call him those sort of names, and one thing and another like that.

Q. Give his language as near as you can.

A. He said, "I don't like to take that, but," he said, "I will have to take it; I am plumb harmless, aint got nothing."

Q. Go ahead.

A. "We have always been friend, and I can not see why you want to treat me like that." Jim said something or another to him, I can not say what it was, and he hit him over the head with the gun, and Hall fell, and I believe he kicked him two or three times in his ribs and shot his gun off.

Q. Were did he shoot it?

A. It went there alongside of him or over his head, I could not tell exactly where it was.

Q. Then what? What did Yates do after kicking him?

A. He said, "You damned son of a bitch, I just dare you to make a move," and I said to Crockett Lee—he was a deputy marshal—and I said, "Go on over there and make him stop, I expect he has killed him," and Crockett Lee said, "No, I won't have anything to do with it; I will have to kill him if I go over there, or he will kill me," and I walked out to him then, and I said, "Jim, don't kick him any more; let's go in and take a drink," and he quit then, and we went in and had a drink, and talked around there a bit, and Jim went out to look for him, and he was gone, and we were in the saloon there drinking awhile then——

Q. If there was some Indians came there, tell about that.

A. It wasn't more than ten or fifteen minutes, may be longer, when these Indians came up there; and when he heard them riding Jim run out, and said, "Who are you?" And one of them mentioned

79 his name, I forget what is his name, and he reached up to him and got a hold of his collar and pulled him down off the horse, and he said to him, "I thought you was Marshal come back here looking for me."

Q. Go ahead.

A. He fired off his pistol then, I believe, and these Indians took a drink with them, and they got out on their horses and rode off between the two houses someway; I don't know where they went to.

Q. Did you hear any firing after they left?

A. Yes, sir.

Q. Where did they fire?

A. They were gone, I expect maybe—not long, before there was shooting commenced.

Q. Where was that?

A. It seemed as though it come from the direction of the other house.

Q. How many shots were fired over there?

A. There was one ball fired, I believe, then at that time, and I said to Yates, "I will bet that is Marshal come back—— "

Q. After the Indians left, before you heard this shot you are now speaking about, did you see them doing any firing as they rode off?

A. Yes, sir; they were shooting over in that direction somewheres.

Q. How many shots did they fire?

A. I could not tell you.
Q. A good many or only a few?
A. There was a considerable firing.
Q. In what direction were they firing?
A. They were in sort of down the hill, right back of the house; it seemed as though they were shooting down there.
Q. Behind Lulu's house?
A. It was in between Lou's house and this saloon, sorter like, down in that direction.

80 Q. Who owned the saloon?
A. She owned the saloon and the house too. These two houses there they are about 300 yards apart.
Q. She owned both of the houses; at least she lived in them?
A. Yes, sir; she rented them.
Q. One was a saloon, what was the other?
A. I don't know what was going on up to the other house; I never was up to the other house.
Q. After the Indians did their firing you started to state about a shot that was fired; how long now was this shot you speak of, or tell about, after this fight between the defendant and the deceased?
A. They were right close together, both shots were——
Q. I am speaking about the time they had their fight, after he head his fight with the deceased, and the Indians came there, as I understand, between the fight.
A. Yes, sir; they came in between.
Q. How long after this fight ended until the Indians came?
A. I expect it was an hour, as near as I can guess at it; it might have been longer, and might have not been so long; I could not say exactly how long it was.
Q. How long after the Indians left until this next shot you speak about occurred?
A. It wasn't long; they seemed right close together, only one shot seemed in that direction, and the other was the other way.
Q. Down where?
A. Down back of the houses, and this seemed like it was in front of the house.
Q. The Indians seemed to be firing back of the house.
A. They seemed to be firing in the opposite direction of where this other shot came from.
Q. Were they ba'k of the house firing?

A. No, sir; they were back down over the hill like, and it seemed
81 like the other shot that was fired was shot in front of the house.
Q. Tell about the other shot.
A. When the shot fired I said, "I will bet that is Marshal come back."
Q. There was a shot fired in front of the house?
A. Yes, sir.
Q. Could you hear the ball?
A. I heard it whizzing past the house.
Q. Then you said, "I will bet that is Marshal come back?"
A. Yes, sir.
Q. Then what?

A. Yates he jumped out in front of the door and stopped about 10 steps, probably.

Q. What did he do?

A. He squatted down and listened for footsteps, I think; I don't know what else.

Q. Then what?

A. He raised up and shot his pistol off in a sort of an angling direction in the air.

Q. What direction?

A. Down towards the other house.

Q. He held it up about like you have indicated?

A. Yes, sir.

Q. Then what?

A. I said to Crockett Lee—no, after he shot that pistol, I think he didn't more than get it discharged until bang, bang, there was two balls come, and I said there is either two over there, or whoever it is has got two pistols.

Q. Did you hear the balls?

A. Yes, sir; they sounded like they come right by there close. They sounded to me like they were right close to me. I was standing right close to Jim, sorter of a little down the hill from him, back of him.

Q. How far from him?

A. I expect about 25 steps from him.

Q. And behind him?

A. Yes, sir, and I was down the hill a little from him.

Q. Then what did you do?

A. I said, "I am not going to get shot accidentally," and I
82 lit out down over the hill, and Crockett Lee and Barney Dorris followed me.

Q. How many shots did you hear after that?

A. There was 8 or 10 or 12; something like that shot; I could not tell exactly how many were shot; there was a good many of them.

Q. You saw nothing more?

A. No, sir; that is all I saw.

Q. When did you get back there?

A. I went home then; me and Barney went home with Crockett Lee; he wanted us to go up there and stay with him, and I told him "No, I wouldn't go up there," and I went up around the creek with him.

Q. Is Crockett Lee here?

A. No, sir.

Q. Did you go home with Crockett Lee?

A. I went pretty near home with him.

Q. You didn't go back there that night?

A. No, sir.

Q. You went home?

A. I went part home with Crockett Lee, and then turned and went to South Town, to South McAlester. Barney Dorris went with me.

Q. Was that your home?

A. Yes, sir.

Q. Next morning what occurred? You learned that he was killed and went up, did you?

A. Yes, sir.

Q. What did you find up there?

A. Found Jim laying in Lulu's house there, laid out there dead.

Q. How many wounds were on him, and where?

A. One in his neck, one in his breast; I forget which side it was on; I could not say.

Q. Do you know what they were made with?

A. I could not tell what they were made with, only they looked like they were made with a bullet. One through the neck came out along here, went clean through him; whether it was bullet or whatever it was, and the other one I would not know that it was.

83 Q. Was the other a bullet wound or a knife wound?

A. I could not say which it was.

Q. What did you take it for?

A. I could not tell what it was exactly; the doctor pronounced it a bullet wound.

Q. Who was the doctor?

A. Lowry. He run a probe in there, and he said, "If there is ball in here it took a different source."

Q. He run the probe in how far?

A. About that far [indicating about 4 inches].

Q. Did you observe the condition of his pockets?

A. I never saw his pockets at all, but they claimed that he had no money on him when they picked him up there.

Q. Do you know of his having any money?

A. Yes, sir.

Q. How much money did he have that night?

A. The last I knew of him he had between 25 or 26 or 27 dollars, something like that; I forget exactly how much he had. He had a twenty-dollar gold piece, and I lost two or three dollars in the game, and Hall lost about the same, I think, and George Perry lost a dollar, and he had a dollar out.

Q. How much did you loose?

A. I lost three dollars in money, and I borrowed some *off* of him and lost it; I forget how much it was; three or four dollars.

Q. You borrowed that from Yates?

A. Yes, sir.

Q. Of your own money you lose three dollars?

A. Yes, sir; I think it was three dollars; three or two or three.

Q. How much did the defendant loose?

A. I think he had about three dollars; I think about that much.

Q. How much did Perry loose?

A. He lost a dollar.

Q. The deceased had a 20-dollar gold piece, you say?

84 A. Yes, sir; a twenty-dollar gold piece and this silver.

Q. Do you know how much silver he had before he went?

A. Yes, sir; he had none at all; before he won this he had nothing but the $20.00 gold piece.

Q. The $20.00 gold pe *ie*and $3.00 and $3.00 and $1.00 is $27?

A. Yes, sir.

Q. You have stated that Yates knew that the defendant had a knife down in his shoe; how do you know that he knew it?

A. When we started off there from South McAlester, when I saw him put his knife in his shoe, I said, "I am not going up there to play any poker with a man with a knife that way," and I went back over to Jim and he said, "Come on, let's go," and I said I am not going, and he said, "Why?" and I said, "I don't want to play poker with a man that has got a knife in his shoe; I don't want to go up there and get killed."

Q. You told Yates that?

A. Yes, sir.

Q. You told Yates that the defendant had a knife in his shoe?

A. Yes, sir.

Q. Do you know where he got that knife?

A. No, sir; I don't know where he got it; I seen him with it in his hand, before he put it in his shoe; he had it laying up there somewheres, I guess.

Q. How did he fasten it in his shoe?

A. He just stuck it down in his shoe; just run it down.

Q. Had no pistol?

A. No, sir; he said he had loaned his pistol out; he said he would just take the knife along with him, it might come in handy. He said it was somewhat of a tough place to go anyhow.

85 Cross-examination by Mr. C. J. FREDERICK:

Q. He would just put the knife down in his shoe; it might come in handy, that it was a touch place to go?

A. He said it was a sort of a touch place to go.

Q. How did you happen to go up there that night?

A. Jim wanted me to go.

Q. How did the defendant happen to go?

A. Jim went and asked him and I believe I went and asked him. We both asked him to go.

Q. Did you offer him any other inducement to go?

A. No, sir; we didn't offer him any inducement at all; we gave him a drink of whiskey.

Q. Who had the whiskey?

A. Jim had it at that time, and he gave it to me to carry afterwards.

Q. How much?

A. It was a quart we had then.

Q. You both went to him to get him to go, did you?

A. Yes, sir; we both asked him.

Q. And then you had a quart of whiskey along?

A. Yes, sir.

Q. Gave you a drink?

A. Yes, sir.

Q. You say that after that you went back and got him to go; Jim Yates first went and asked him to go?

A. Yes, sir.

Q. He first asked you to go?

A. Yes, sir; and he said, "We will get Bob Marshal, maybe he will go along up, and we will have a poker game up there.

Q. "We will get Marshal to go along and we will have a game of poker?"

A. Yes, sir.

Q. What did Yates want you to play cards for? Did you have
86 any money?

A. Yes, sir; I had a little money.

Q. You had three dollars?

A. Yes, sir.

Q. Will that amount make an interesting game of poker?

A. It don't make a big game; it makes a small game.

Q. What did he want Marshal to go for?

A. He thought if he could beat him he could win some money off of him, because he was a groceryman, and——

The DISTRICT ATTORNEY. Never mind that.

Mr. FREDERICK (of counsel for defendant). I think we have a right to have that whole conversation.

The DISTRICT ATTORNEY. He is not giving any conversation; he says, "he thought."

Mr. FREDERICK (of counsel for defense). I don't want you to tell what you thought. Go on and tell us what Yates said. The reason he asked him to go.

A. He said to me, "Let's go on up to the hill and let's go and play some cards to-night." And I says, "Who will play." I played pretty near all the time at that time, and he said, "Bob Marshal over here, he will play; I saw him up town the other day and he had considerable of money, and he was playing, and he was away off looser once, but he played out even;" and he says, "I do not believe he is a very good player."

Q. Did he not say that he thought he was a soft snap?

A. Yes, sir.

Q. How come you to go to get Marshal to go?

A. He says, "I have dun asked him once; you go over there and ask him and see if he will go;" and I went over and asked him.

Q. You went?

A. Yes, sir.

Q. Yates had a quart bottle of whiskey when he went?

A. Yes, sir.

Q. And he gave him a drink?

A. Yes, sir.

87 Q. And you gave him a drink of whiskey, didn't you? Didn't you take one bottle with you?

A. He had two bottles ——.

Q. Then didn't you take a bottle and go and give him a drink?

A. It seems to me I did.

Q. That is when he agreed to go?

A. Yes, sir.

Q. Then is when it was that he put the knife in his shoe?

A. I believe it was.

Q. What time in the evening was this?

A. I suppose it was between 8 and 9 o'clock.

Q. That was in the night after dark?

A. Yes, sir.

Q. Where was Marshal when you saw him?

A. He was in his store.

Q. Where was he when Yates went to see him?

A. He was in the store.

Q. How long after Yates went to see him and gave him the drink of whiskey until you went back and saw him?

A. It wasn't a long time; Jim came and saw me just about dusk.

Q. Then you and Jim both went and saw him?

A. Yes, sir.

Q. It was after you went to see him about going that you went to Yates and told him that the defendant had a knife in his shoe?

A. Yes, sir—no, I went back and saw him getting ready, and he had his knife in his shoe, and I went out and said, "I am not going up there.

Q. You told him that he had a knife in his shoe?

A. I told him that I wasn't going up at first, and he said, "What is the reason?" and he said, "You have helped drink up all my whiskey and you don't want to go out there with me." And he wanted to know the reason, and I finally told him; I said, "He has got a damned big
88 knife in his shoe, and I don't want to go up there to playpoker with a man that carries a knife in his shoe, and he said he had been talking around there about being touch, and one thing and another, and he said, "I will just make him eat the damned knife if he ever makes a break with it.

Q. Had Yates been in the store that evening before?

A. He had been in the store off and on all evening; he had been laying on the lounge in there. I saw him laying on Bob's bed in there.

Q. He said he had seen him up to Old McAlester and he had a right smart of money?

A. Yes, sir.

Q. And he thought if he would go up there he could win some?

A. Yes, sir; he thought he was an easy snap, and maybe a body could win some money off of him.

Q. Did Yates say why he wanted to get money from him? Why he wanted to win it? Tell us what he did say.

A. There was so much I can not tell the whole thing he did say; there was so much. I had been drinking considerable myself, and I can not remember all he did say.

Q. You can tell us some of it. Did he not tell you that if you could not get him to go along to play in a game, to tell him to go along with him as a posse under him, as a deputy marshal?

A. I don't remember whether he did or not.

Q. At any rate he told you to go and get him?

A. He said, "You go on over there and get him to go," and I went over there and asked him and he said he would go, and he said he didn't like much to go, and he said he had made arrangements to go down and see a certain party, but he said he would go anyhow.

Q. Didn't Yates tell you for you to go and get him to go, that
89 Hall had some money, and he needed some money as he was off on a trip?

The DISTRICT ATTORNEY. This is matter that is entirely matter for the defense, and I object to the gentleman putting leading questions.

Mr. FREDERICK. It is a part of the same transaction drawn out by yourself.

The DISTRICT ATTORNEY. Not at all; no part of the transaction.

Mr. FREDERICK. Yes; this witness has gone on to tell about Yates getting him to go there to see him, and has told about seeing him put a knife in his shoe, and that they wanted him to go up there to play a few cards. The district attorney drew that out.

The DISTRICT ATTORNEY. I did not.

Mr. FREDERICK. Even if this was original matter, even if this was acting directly as a defense, the theory of this defense is this: That this witness on the stand and the deceased has made an arrangement to get this young man, the defendant, to go up there that night at that dive in order that they might get his money; that the deceased, the defendant, had money; that he believed that he had some money, and he wanted the money, and he wanted to get him up there. He went there with his liquor, and then sent this witness afterwards to induce him to go up there that night. That would be original to show the purpose to take this young man up there.

The DISTRICT ATTORNEY. The question I raise is not whether it is original or not, but whether it is testimony for the defense or Government; whether it is new matter or not. You are entitled to it, but you are not entitled to put leading questions. The gentleman makes the point that Yates wanted to get his money. Every man that sets down to
90 play cards wants to get the other's money. Every man that sells goods to a customer wants to get his money. A man would be an infernal fool, if your honor will pardon the expression, to set down to play cards when he has money to put on the game with a man who hasn't any money. Of course he wanted to get the money, and of course the defendant when he set down to play cards wanted to get the money. That is what every man when he sets down to play cards wants to do. It is what a lawyer wants to do when he is defending a man, to get money, and he would not defend a man without money, unless he was appointed by the court and your honor would require him to do it. The point the gentleman makes was not in response to the question I raised before your honor, but entirely for another purpose. It will do well enough for him to argue it to the jury, if he wants to, but I simply answer if they were both playing cards they wanted each other's money. That is the universal rule, I believe. The question I objected to is this: He is my witness; I started with the witness at McAlester, it is true; he stated that he went with Yates and the defendant from McAlester to play cards; he said that the defendant put a knife in his shoe before he left. Now, then, with regard to this talk, I drew out nothing. This witness, of course, I put on the stand as my own witness, but, at the same time, if they undertake to prove defensive matter, new matter, entirely different, entirely new from what I drew out, of course they make him their own witness, and they ought not to lead him right along.

The COURT (to Mr. Frederick). What was the question you put?

Mr. FREDERICK. I asked him if Yates didn't tell him to go down there to get Marshal to go with him up there; that he had money, and that he wanted it, and that he needed the money to make a
91 trip with; that he would get him up there and he would get it.

The COURT (to witness). You may state just what Yates said about that.

Mr. FREDERICK. I want to ask this question for another purpose; if the witness denies it I want to contradict him on it.

The COURT. Let the witness state what was said by Yates in that regard.

The WITNESS. He said to me "Come on, let's go and play some cards up there to-night." He said, "Bob is good easy game, and I expect probably we can win some money off of him." I had a sort of an idea he was trying to get me——

The DISTRICT ATTORNEY. Never mind your idea.

The WITNESS. I went home after he told me this and put away all the money I had except $3, which I had in my pocket. I said to myself, "if I win it is all right, and if I loose it is not very much." He said, "Bob has got lots of money, if we can win it; I need some money as I am going away on a big trip to-morrow, and I would like to win a little." I agreed to go after I went up and put my money away.

Mr. FREDERICK. Was it then you told him about the knife?

A. No, sir. I told him before about the knife. I made that as an excuse; I told him I hadn't much money to loose anyhow.

Q. What did he say about the knife?

A. He said he would make him eat the damned knife if he made a break with it.

Q. I will ask you further if he said anything about if you could not get him to go another way, if you could get him to go as a posse, if he didn't tell you——

The DISTRICT ATTORNEY. I make the same objection to that.
92 He is just putting words right in the witness's mouth.

The COURT. The rule permits cross-examination to go as to the whole case in putting leading questions, but where the matter is purely defensive I think you ought to put it in another form.

Mr. FREDERICK. I want to ask him this——

The COURT. This witness does not seem to be unwilling to tell what he knows about it.

Mr. FREDERICK. I want to ask him if he didn't say this, and then if he said he didn't say this I will——

The DISTRICT ATTORNEY. He must first ask the question generally as to what he wants to draw out without putting it in the shape of a leading question. He may then follow it by another question, but to put the other question now makes it a leading question.

The COURT. He may save any necessity if impeachment. He may admit what you want to prove.

Mr. FREDERICK. I first asked him what was said by Yates. I will ask him the question again, though, generally. (To the witness). If Yates told anything else except what you have stated tell us what it was, if he said anything else in regard to his goin*t* to get Hall to go up there that night?

A. I can not exactly say what he did say. He had been around me all evening, following me around, to get me to go and get him to go and play cards. There was so much said I don't remember half of it that he

did say. I didn't want to go very much, and I didn't pay very much attention to his talk. I didn't care very much about going up there on the hill to play cards.

Mr. FREDERICK. I want to ask the witness this question, which is leading: If Yates did not tell him if he could not get the defendant to go any other way to get him to go as a posse?

93 The COURT. Let him answer the question.

Mr. FREDERICK. What did Yates tell you in regard to that; did he tell you that?

A. I don't remember whether he did or not. I do not believe he said anything at all to me about the posse business.

Q. Do you know Ed. Sprague?

A. Yes, sir.

Q. He is here as a witness?

A. Yes, sir.

Q. Didn't you tell him at South McAlester, shortly after this killing, that Yates told you to go and get Hall to go up there that night; that Hall had some money; that he wanted that money, and he was going to have it, and if you couldn't get him to go any other way to get him to go as a posse for him, Yates, or a guard for Yates, or something like that?

A. No, sir.

Q. You did not tell Sprague that?

A. No, sir.

Q. Do you know John J. McCarthy?

A. Yes, sir.

Q. Didn't you tell him the same thing?

A. No, sir; I don't remember of telling him about any posse business.

Q. As a guard, then?

A. I might have said something similar to that, but I do not remember saying anything like that. Yates was talking so much to me about getting him to go that I don't remember all that he said, but I don't remember of him saying anything to me about getting him to go as a posse.

Q. To go as a guard or an officer up there?

A. He never said anything at all about an officer. He said, "I will protect you if he pulls a knife on you." And I said, "I don't want to play at all; if the man got a top hand on him, he would be liable to take the money anyhow, a man that carried a knife in his shoe," and he said he would protect me if he pulled the knife on me.

Q. You all went up there; got up there about 9 o'clock?

94 A. I expect about 9:00 o'clock.

Q. Who proposed the game as you went up?

A. I forget who proposed the game. I believe it was Jim said, "Let play some cards; some freezeout for the drinks."

Q. That is the way it first started?

A. Yes, sir; I think that's the way it started.

Q. Whereabouts was it they played?

A. Right in that saloon there.

Q. You have been up there frequently, haven't you, and know the grounds?

A. I have not been there often; I have been there several times.

Q. (Witness is shown map.) Do you remember whether it was the first house you came to in going up to Chippy Hill that you played at?

A. No, sir; I guess it must have been this one right here north of it.
Q. Who was in the first house you came to?
A. George Perry and Barney Dorris and Lulu May——
Q. You are thinking about to the beer house?
A. They were all up to the saloon.
Q. Was there anybody in the first house you came to?
A. I do not remember; I don't think we stopped.
Q. What direction from the first house you came to is it to where the beer house is?
A. It is up towards old McAlester; it is north, I believe.
Q. Who was at that first house you came to?
A. I don't remember of anybody being there; there might have been somebody there; I do not remember. I think all the women were over at the saloon.
Q. You played a game at the saloon, did you?
A. Yes, sir.
95 Q. Who played the game?
A. There was me and Jim and Bob there was playing first.
Q. You first played for the drinks?
A. Yes, sir; we played freezeout for the drinks.
Q. When did you commence playing for the money?
A. And then Jim said "let's put in a dollar apiece and play freezeout for the drink and for who takes the money."
Q. You did that?
A. Yes, sir; big George Perry set in the game.
Q. Then Jim won that, did he?
A. Yes, sir; he won everything.
Q. Did Jim get any more cards than he ought to have any time in the game?
A. He a good many times had the whole deck, or half of it, anyhow.
Q. Playing with them?
A. Yes, sir.
Q. When he was only entitled to play five; you only play with five cards?
A. Yes, sir; that is all you are supposed to play with.
Q. That is all you have a right to play with if you are playing fair?
A. Yes, sir.
Q. He would have half of the deck?
A. Yes, sir; a considerable of them.
Q. Jim won all the time?
A. He could not help but win them that way.
Q. Jim told him if he had money to put it up; to play it?
A. Yes, sir.
Q. What did Hall say about that?
A. He said that was all the money he was playing in front of him; that is all that he had.
Q. When he reached down to get the cards then it was that Yates pulled the pistol on him, was it?
96 A. He said "Bob, them under the table plays too," or something to that effect.
Q. Who had the balance of the deck; Yates?

A. Yes, sir.

Q. He had the balance of the deck to play——

A. He only had five cards at that time, I think, Yates didn't.

Q. When Marshal reached down under the table to pick up the cards Yates pulled his pistol on him, did he?

A. He went down after something; I don't know what he went after.

Q. When he reached under the table he pulled his pistol on him?

A. Yes, sir; he went down sorter like he was going to his shoe.

Q. Did he go to his shoe?

A. I could not say which way that he went.

Q. Were you at the table?

A. Yes, sir.

Q. You could see that he went towards the floor?

A. I could see that he moved his leg, and he sort of went down; I don't know what was he after; I thought maybe he was going after his knife.

Q. You thought that?

A. Yes, sir; sorter of.

Q. You didn't see the knife there?

A. No, sir.

Q. When he reached under the table then it was that Yates pulled his pistol on him?

A. Yes, sir; and he came up and grabbed the pistol.

Q. Then Hall reached up and grabbed the pistol, and they had a scuffle?

A. Yes, sir.

Q. You didn't see any knife?

A. No, sir.

Q. You saw that scuffle?

A. I saw the first part of it; when he grabbed the pistol I went out of the window.

Q. You saw no knife?

A. No, sir.

97 Q. You went out of the house?

A. I jumped out of the window.

Q. Crokcett Lee was there?

A. No, sir; not at that time. He was in the tent; there was a tent right in behind, and he was in the tent.

Q. You say you went to the door?

A. I came around and came to the door.

Q. Where was Yates?

A. Both of them in the house just quit tussleing.

Q. Anybody else in there?

A. No, sir; only them two. Big George may have been there in there.

Q. That is George Perry?

A. Yes, sir.

Q. You say there were both there?

A. Yes, sir; standing there talking.

Q. Did they come out of the house?

A. After he picked up the lamp and told me to keep out of there, I moved away from the door, and then they came outside.

Q. What did they do outside?
A. Jim was cursing him.
Q. Told him this language you used awhile ago?
A. Yes, sir.
Q. Then you say that the deceased knocked the defendant down with his pistol?
A. Yes, sir.
Q. And kicked him?
A. Yes, sir.
Q. Shot his pistol off by his side?
A. Yes, sir; by his side or over his head; I could not say which way.
Q. Where was Crockett Lee then?
A. Standing right in behind me; right outside of the house.
Q. Where was Barney Dorris?
A. He was standing there.
Q. Did anybody interfere at that difficulty between them?
A. Nobody went near.
98 Q. Did anybody pull him off?
A. No, sir; he quit himself, and I walked up to him ——
Q. What did Hall do?
A. He laid there, drawed himself all up in a knot.
Q. You all went in the house and got a drink and left the man out there on the ground?
A. Yes, sir.
Q. Didn't help him up, didn't speak to him, didn't offer to help him?
A. No, sir; I know that I didn't.
Q. You didn't know but what he was dead?
A. I didn't know; he hit him pretty hard.
Q. You never saw him any more?
A. No, sir.
Q. You never saw him any more until you came here?
A. No, sir.
Q. You went in to take a drink and then Yates went out to look and hunt for him again, you say?
A. He went out to look for him.
Q. What was he looking for him for?
A. He was looking to see whether he had a knife.
Q. Then about an hour after that you say these Indians came along?
A. I don't know how long; I can not tell.
Q. You have stated it was about a hour?
A. It was somewheres near an hour.
Q. What did you do during that hour?
A. We were drinking around there.
Q. Did you go back and play cards any more?
A. No, sir; we did not play any more cards.
Q Did Yates stay there all the time?
A. He was around there.
Q. Did he stay in the house all the time?
A. No. sir.
Q. Did you stay there all the time?
A. No, sir.

99 Q. Where did you and Yates go?

A. Yates said to me, "Come on; let's go and search these whore houses, and if I find him and he has got a gun I will kill him."

Q. Did you go?

A. I went with him to one house.

Q. Whose house is that?

A. Ada's house.

Q. Did you search that?

A. Yes, sir; he made her open the door and he looked in and he said, "He is not here; let's go on up to Lou's." I said, "No; that is as far as I am going with you; I am going home."

Q. Did he go armed around there about that house; did he have his pistol with him?

A. He had his pistol with him.

Q. How did he have it?

A. I think when he made her open the door he had the pistol in his hand.

Q. He was hunting Marshal then?

A. Yes, sir.

Q. Didn't find him there, and he wanted to go to another place?

A. He wanted me to go to Lulu's place.

Q. You would not go?

A. No, sir.

Q. Where did you go?

A. I said I am going home. He said, "Let's go on back up to the saloon and get another drink and I will go back down with you."

Q. Did you do that?

A. Yes, sir; I went to the saloon to get another drink with him, and got it, and I was just getting ready to leave him——

Q. These Indians came before that; when——

A. No; they came afterwards; the Indians came before we went down ——

Q. It was after the Indians had been there and he pulled one of them off of his horse that you and Yates went——

A. No, sir; it was before.

Q. You and he went back up to the house, and he told you you
100 would both take a drink and he would go home with you.

A. Yes, sir; just as we got in and was drinking these Indians come.

Q. He pulled one of them off of the horse?

A. Yes, sir.

Q. What was it he said there when they came up?

A. He told him to stop; they had rode up against the house on a sort of a lope and he jumped out and pulled his pistol and said, "Who in the hell are you?" and the Indian mentioned his name, and he looked around at the rest of them, and he grabbed one of them and he pulled him off of his horse, and he said, "I thought you was Marshal come back here looking for me," and there was several remarks made and they came in and drank and got out and got on their horses again. I believe that George Perry told them to tie their horses around there somewheres; they went back off and went to shooting.

Q. Where did Yates go?

A. We staid in the house there and they commenced shooting out that way, and there was a shot fired passed the door from a different direction, and I said, "I am going to get out of here."

Q. What did Yates do?

A. He got out of there.

Q. What did he say?

A. He said, "I believe that is Bob," and he jumped out there and he squatted down in front of the door and listened for footsteps.

Q. What time was that?

A. I could not tell what time it was.

Q. He went out of there about 10 steps and squatted down?

A. It was five or six steps or further in front of the door, and he set there for a minute and raised and fired his pistol.

Q. How many times did he fire?

A. Only once, right there.

Q. Did he fire any more after that?

101 A. No, sir; but before that he fired several shots. He shot his pistol through the house once and shot once through the floor while we were in there; shot his pistol off several times.

Q. What sort of a pistol did he have?

A. He had a six-shooter, white handle.

Q. Did you see him load his pistol that night?

A. I saw him load his pistol once. He loaded it there; he held it and George put the cartridges in it.

Q. You don't know how many times he shot it there?

A. He shot it three or four times that evening.

Q. Shot it in the house, you say?

A. Yes, sir; twice that I remember of.

Q. Who was he shooting at there?

A. Just shooting his pistol.

Q. After he got out he squatted down on the ground and raised it up; got up and fired it; where did he fire next?

A. He raised up and shot his pistol in sort of an angling direction, in that way.

Q. How do you know it was angling?

A. I saw him.

Q. Did he say anything?

A. No, sir.

Q. Did he stay there, or what became of him?

A. He fired his pistol off, and as he fired it off there was two balls came by there, and I left.

Q. How close to the house did the balls seem?

A. It seemed like they were right close to the house; I could not tell how far.

Q. Yates had been talking to you all evening, trying to get you to get Hall to come up there?

A. Yes, sir.

Q. How many bottles of whiskey did he have?

A. He had two at first, but he went and treated one of them out before——

102 Q. How much did he get up to the saloon with?

A. Very nearly a quart up there.
Q. I believe you say you followed gambling at that time?
A. I was playing cards then considerable.
Q. Yates was a deputy marshal?
A. Yes, sir.
Q. And Crockett Lee?
A. Yes, sir.
Q. You were not, were you?
A. No, sir.

Re-direct examination:

The DISTRICT ATTORNEY. When did you get here?
A. I got here the 26th day of last month.
Q. You have been here ever since have you?
A. Yes, sir; I went away this last week.
Q. When did you get here last?
A. I got here Saturday evening.
Q. Have you been talking to defendant's counsel about this case?
A. No, sir.
Q. Never have been up to their office?
A. Yes, sir; I was up to their office.
Q. When?
A. Yesterday.
Q. Whose office?
A. Frederick's.
Q. When did you go there?
A. I expect between 2 and 3 o'clock.
Q. How did you come to go there?
A. He said he wanted to see me. Wanted to talk to me a little.
Q. When was it he wanted to see you yesterday?
A. Yes, sir.
Q. What time did you get in yesterday?
A. I got in Saturday evening.
Q. What time?
A. About 8 o'clock, I think.
Q. You didn't see me until this morning?
A. No, sir.
103 Q. This morning is the first time you have talked to me about this case?
A. Yes, sir.
Q. How long were you in Mr. Frederick's office yesterday?
A. About 20 minutes, I expect.
Q. I will ask you if last evening you were not with the defendant's father?
A. I got an introduction to him; yes, sir.
Q. Who introduced you?
A. Pink Hooper, I believe, is the name.
Q. How long were you with the defendant's father last evening?
A. I expect about 10 minutes.
Q. How long were you in Mr. Frederick's office yesterday?
A. I expect about 20 minutes that I was up there.

Q. You didn't know yourself, I suppose, that there was a rule of this court that defendant's lawyers could not talk to Government witnesses without first getting the permission of the court? You didn't know that?

A. No, sir.

Q. You didn't know there was being any rule of the court violated?

A. No, sir.

Q. Who came and told you that Mr. Frederick wanted to see you yesterday?

A. George Perry.

Q. He is another Government witness that is here?

A. I believe he is.

Q. He is the one you call Big George?

A. Yes, sir.

Q. The one that run the bar for Lulu?

A. Yes, sir.

Q. Hadn't you been told to see me first?

A. Yes, sir.

Q. You had been told to see me before you went to the other place?

A. Yes, sir.

Q. Why did you go?

A. He sent for me and I thought I would go up and see what
104 he wanted me—I thought he wanted me on some business. The fellow came and told me the second time.

Q. Perry did?

A. Yes, sir.

Q. And who was it introduced you to the defendant's father?

A. Pink Hooper.

Q. He is a witness for the defendant is he not?

A. Yes, sir; I believe he is.

Q. Where was it that he introduced you to the defendant's father?

A. Right on the sidewalk between the Globe saloon—right below the Globe saloon.

Q. Did you go off from there with him?

A. No, sir; we just stood there for a few minutes.

Q. This all occurred yesterday?

A. Yes, sir; yesterday evening.

Q. Do you know how much money this defendant had with him at that place when you were gambling?

A. He said he only had 2 or 3 dollars; that is all I saw.

Q. That is all he lost. In your cross-examination you stated that when the defendant went down as if he was going after his knife that he moved his leg, and went in that direction, and you went towards the window?

A. Yes, sir.

Q. Why did you go towards the window?

A. I sorter expected trouble.

Q. You had seen the knife?

A. Yes, sir; I saw him put it there.

Q. He had said to you it would come in handy, perhaps, at the time that he put it in there?

A. Yes, sir.

Q. You stated, in telling about the conversation between you and Yates, that Yates said, when you told him about the defendant putting the knife in his boot, that he had been bragging about being tough?

105 A. Yes, sir; he said he had been up on the hill with him once, and he had made some cracks of some kind or another and he would see how tough he was.

Q. You stated to Mr. Frederick that the deceased told you that the defendant had been bragging about being tough, how tough he was, and if he drew the knife on him he would make him eat it?

A. He said "If he pulls that knife on me I will make him eat it, or "eat that damned knife."

Q. You stated to Mr. Frederick that he told you if he drew the knife on him he would make him eat it, and he told you if he drew it on you he would protect you?

A. There was so much said about the knife——

Q. I am *nit* asking you what you said; I don't care anything for what you said. Of course what you said what the deceased said is what I want. You have said that the deceased said that if he, the defendant, drew his knife on him, he would make him eat it?

A. Yes, sir.

Q. And you have also said that he told you that if he drew the knife on you he would protect you?

A. Yes, sir; he said he would protect me it he pulled it on me.

Q. All of his statements were conditional; if the defendant should pull his knife, draw his knife, he would make him eat it, or he would protect you?

A. Yes, sir.

Q. That is after you had told him that he had the knife?

A. Yes, sir.

Q. You used the expression, you said that he had a damned big knife?

A. I said that he had a damned big knife.

Q. Was the blade about 8 inches long?

A. I don't know how long it was; it was a blade about that long (indicating about 4 inches).

106 Q. It was a dagger?

A. Yes, sir; that is what they call them, I guess.

Q. He told you, the defendant did, that he did not have any pistol; did he tell you where it was?

A. He told me that he had loaned his pistol to Bart Salmon, I believe.

Q. You gambled a little in those days?

A. Yes, sir.

Q. Would you gamble with a man that did not have any money?

A. Whenever I set down I tried to win a little something when I could.

Q. You would not play with a man that had no money?

A. No, sir; I tried to pick my games to play with moneyed men.

Q. They had been drinking a good deal when they were playing that game?

A. Yes, sir; considerable drinking done.

Q. Was Yates sober or drunk?

A. He was pretty full.

Q. I will ask you if he was not the tightest man there?
A. I could not say; I expect he was, though.
Q. He did not get other people drunk and keep sober himself?
A. No, sir.
Q. You say that after Yates had knocked the defendant down he went into the house?
A. Yes, sir.
Q. And he went out again after awhile?
A. Yes, sir.
Q. You stated to Mr. Frederick, on cross-examination, that when he went out, he went out to see if he had a knife?
A. He went out to see—he told me——
Q. Hold on a minute; I want to call your attention to what you said to Mr. Frederick; you said that when Yates went out of the house after the defendant had left, that is, after he had knocked him down,
107 that he went out to see if the defendant had a knife; how do you know that is what he went to see?
A. I told him that when he was standing there he had either a knife or something in his hand when Jim was holding the gun on him.
Q. Yates had claimed that he was cut before that?
A. Yes, sir.
Q. When you told him that he went out?
A. Yes, sir; he went out to look for it.
Q. Did he say that he was going to look for it?
A. He thought it was laying there yet.
Q. Thought maybe he would find the knife on the ground?
A. Yes, sir.
Q. That is what you mean—thought maybe he would find the knife laying on the ground?
A. Yes, sir.

108 WILLIAM C. YOES, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to-wit:

Question. What is your present business?
Answer. I am acting jailer now.
Q. Mr. Pape, the jailer, is not here?
A. No, sir.
Q. Have you the jail record there?
A. Yes, sir.
Q. Can you state at what time the defendant was brought to the jail?
A. The record shows——
Q. You have the record in your hand?
A. Yes, sir; this is the record we keep over at the jail.
Q. You may read from it; where you there when he was brought there?
A. No, sir; I was not.
Q. The only thing you have got is the record?
A. Yes, sir.
Q. Just read from the record, beginning to end.

Mr. FREDERICK (of counsel for defendant). I object to anything that record shows. Of course we do not make any objection as to the fact when he was committed.

The DISTRICT ATTORNEY (to witness). What does it show?

A. "Hall, Robert Marshal; age, 23; light complected; light hair; blue eyes; five feet seven inches; charged with murder; on writ of removal; southern district of Mississippi; Judge Niles; arrested by Fred W. Collins; born in Mississippi; single; not married; reads and writes; weighs 130 pounds; merchant by occupation; arrested in Jackson, Mississippi, Feb. 20th; committed March 6th."

Mr. FREDERICK. The district attorney has gone on and had the witness to read from the record. I did not understand that the
109 court ruled on it. I object to the reading of the record. It is the data that the jailer obtains from some source; I do not know what; I do not object to proof as to the time when the defendant was committed, but as to the further facts—the further data that the jailer may have—I object to that, because it is not relevant to this issue.

The COURT. I do not think it can work any injury one way or the other.

Mr. FREDERICK. It is hearsay of the very worst kind; we save the point.

110 J. R. STEPHENS, having been duly sworn upon behalf of the Government, was examined by the district attorney, and testified as follows, to-wit:

Question. You are the turnkey here at the jail, are you not?
A. Yes, sir.
Q. Were you there when the defendant was brought there?
A. Yes, sir; I was there when he came.
Q. Were you present when he was put in jail?
A. Yes, sir.
Q. Were you present at the time that this record was made by the jailer?
A. Yes, sir.
Q. Did the prisoner state where he came from?
A. I don't recollect that he did.
Q. You do not remember that?
A. No, sir.
Q. Who turned him over to you?
A. The marshal of the southern district of Mississippi, I think.
Q. Do you remember his name?
A. I don't remember his name; I could not tell you that, now.
Q. Would you rememember it if I was to call it?
A. I think I would.
Q. Was it Fred W. Collins?
A. Yes, sir; I think it was.

111 JAMES FREE, having been duly recalled by the Government, was examined by the district attorney, and testified as follows, to wit:

Question. After the night that James Yates was killed, state if you saw anything more of the defendant.
A. No, sir.

Q. You never saw him any more?
A. No, sir.
Q. Until he was arrested?
A. No, sir; I never saw him until I saw him here.
Q. What was his business there?
A. He was running a store; a grocery store.
Q. Who took charge of the grocery store after he left?
A. Some man there at South McAlester, I forget his name—Ridenhour is his name.
Q. Did any of the defendant's friends or relatives come there afterwards, that you know of?
A. His father, this gentleman there, came afterwards. That is what they said; I never saw him.

112 Government rests.

113 The U. S. dist. attorney offered in evidence a "copy" of a writ of Judge Miles, for so. dist. of Miss., showing that defendant was arrested in Miss. and sent here from there by him:

"*The United States of America to the marshal of the southern district of Mississippi:*

It appearing to me that Robert Marshall Hall has been duly committed by R. H. Winter, a commissioner of the circuit court for the southern district of Mississippi, upon a charge of murder on an indictment from the circuit court of the United States for the western district of Arkansas,

You are hereby commanded to take the body of the said Robert Marshall Hall and deliver him into the custody of the marshal of the United States for the said western district of Arkansas, to be there dealt with according to law; and do you then and there make return of this writ into the clerk's office of the said southern district of Mississippi.

In testimony whereof I have hereunto set my hand and the seal of the said district court for the said southern district of Mississippi, this the 2d day of March, A. D. 1892, and of the Independence of the United States the one hundred and sixteenth.

(Signed) HENRY C. NILES,
U. S. Judge.

(Endorsed on back:) "Copy. United States vs. Robert Marshall Hall. Order for removal of prisoner to the western dist. of Ark. Received Mch. 2, 1892. Fred. W. Collins, U. S. marshal.

114 To the introduction of which the defendant at the time objected, which objection was by the court overruled, to which ruling of the court the defendant at the time excepted. The United States having closed its case, the defendant to maintain the issues on his part introduced and examined the following-named witnesses: R. J. Abbott, George Perry, Mrs. Ada Bullard, Robert J. Abbott, B. F. Roberts, Ed. G. Sprague, John

J. McCarthy, R. Pink Hooper, John Ridenhour, Jim Walker, Thomas Wilson, Robert Marshall Hall (defendant), who testified as follows, to wit:

115 *Testimony introduced by the defense.*

R. J. ABBOTT, having been duly sworn upon behalf of the defense, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Q. What is your name?
A. Robert J. Abbott.
Q. Where do you live?
A. South McAlester, Indian Territory.
Q. Do you know this defendant, Robert Hall?
A. Yes, sir.
Q. Where did you know him?
A. I knew him in South McAlester.
Q. When?
A. I knew him in 1891.
Q. What was he doing there?
A. He was running a grocery store, family groceries.
Q. What were you doing?
A. I was running a resta*raun*t.
Q. How near was your restaurant to his store?
A. Probably 50 or 60 feet.
Q. Same side of the street?
A. On the same side; yes, sir.
Q. Did you know Jim Yates?
A. Yes, sir.
Q. Do you know when it is said that James Yates was killed?
A. Yes, sir.
Q. Had you seen him before his killing? How long before he was killed was it that you had seen him?
A. I don't know just what time of night he was killed; I saw him on the afternoon of the third of August, 1891; he was in my place.
Q. You saw him the day he was killed the night following?
A. Yes, sir.

Q. What was he doing at your place?
116 A. He came in, the first time he came in and left his belt and revolver.

Q. State when you saw him again.
A. I seen him again, probably it might have been 5:00 o'clock; I didn't know just what time of day it was.
Q. Where?
A. In there in my place.
Q. What did he come for?
A. He came in to get a glass of beer we sold as root beer. He asked me, and I set it out to him.
Q. Go on and tell what he did and what he said?
A. I set it out, and he had a bottle of whiskey, and was going to pour some in it, and I told him I wouldn't allow it in there, and he put the bottle back, and Mr. Marshal was passing by ——.

Q. This defendant?

A. Yes, sir; and he hollowed at him to come in, and he didn't make any halt, and he said "I will kill that son-of-a-bitch before morning."

Q. How long had you known Yates?

A. I had known him for a couple of years.

Q. Do you know his general reputation up there in that country for being a lawless and reckless man?

The DISTRICT ATTORNEY. I do not think any of this testimony is competent at the present time. The thing that is shown now is that there was a fight between them at the saloon; this is shown by James Free. It is then shown that after that that this defendant left there, smarting under the blows that he had received, went three-quarters of a mile and got pistol, and said at the time that he procured the pistol, substantially, that he was getting it for the purpose of killing a man. He did not state who the man was, but told the purpose; told them that they would know in the morning who it was. He said that the man had knocked
117 him down with a pistol, and called him a son-of-a-bitch, and that no man could live who would do that to him, and that he intended to kill him before morning; walked back three-quarters of a mile and slays his adversary. As the thing now stands, if your honor please, there is no law, as I understand it, that permits threats of the deceased, if he had made them, or his character, to be introduced before the jury. Before a threat can be admissable there must be evidence of the fact that at the time that the man was fighting the adversary; that there was a fight of some kind, and not that he was resisting a man that had walked three-quarters of a mile, procured a pistol, and said that he intended to kill him, substantially. It seems to me that threats are not admissible at this stage; that they must get something more than they have now in order to admit threats or the character of the deceased.

The COURT. Have you any evidence to offer on the question of the difficulty, or shooting?

Mr. FREDERICK. Yes, sir.

The COURT. You had better offer that firsst. Before the court passes upon the question as to whether threats are admissible or the previous bad character of the deceased, it is entitled to see the whole case as affecting a physical act of violence. For the present this evidence is excluded. You can call it up again afterwards.

Mr. FREDERICK. Yes, sir; we can show it just as well that way as the other.

118 GEORGE PERRY, having been duly sworn upon behalf of the Government, was placed on the stand and examined by the defendant as follows, to-wit:

Mr. FREDERICK. If the court please, this witness, George Perry, is a witness that was sworn by the Government, subpœnaed by the prosecution of this case. I am not sure that I recollect the rule in regard to the calling of witnesses by one side where they have been subpœnaed by the other. My recollection, however, is that we can call them for cross-examination, and that we do not necessarily make him our own witness by placing him on the stand.

The COURT. That is the rule; where parties are subpœnaed by one side the other may call them and cross-examine them, but the party who may have had him subpœnaed and sworn of course is not precluded from impeaching him. He does not make him his witness that far, but he makes him his witness far enough that you may cross-examine him.

The DISTRICT ATTORNEY. More especially is that true when it turns out, as it has been proven in this case, that the witness has been used as a go-between between counsel for defendant and the witness James Free, here yesterday.

The COURT. The rule as to that is that you may cross-examine the witness and the other side may impeach him if they see proper.

Mr. FREDERICK. If the court please, with regard to the go-between business, I want to say this: while it is not proper for me to in-
119 terpose objections and declarations at every time, I never sent for that witness in the first place yesterday. The fact that the witness did come there, I didn't get anything from him; I did not get half from him what I did this morning. I am not responsible for that. The court recollects that the district attorney very distinctly announced that he closed Saturday evening with the exception that he might introduce the witness Micky Free, and not this witness, and the fact that he had been sworn, and had not been introduced by the Government, lead me to want to see him and see if we cared to use him ourselves.

Question. You know this defendant, Robert Marshall Hall?

Answer. Yes, sir.

Q. Where did you know him?

A. I knew him in South McAlester.

Q. When did you know him there?

A. Last year, last spring. This last spring was a year ago.

Q. Did you know Jim Yates?

A. Yes, sir.

Q. Where did you know him?

A. I knew him in South McAlester.

Q. Do you know when Yates was killed?

A. Yes, sir.

Q. Do you know where he was killed?

A. Yes, sir.

Q. I will get you to commence and tell us about where it was and when it was, and what happened there?

A. It was on the 4th day of this month, was a year ago.

Q. It occurred up on Chippy Hill, I reckon?

A. Yes, sir.

Q. Where did you first see Yates and the defendant that night?

A. They came up to the Choctaw beer saloon on the hill about 8:00 o'clock I guess, somewhere about 8:00 o'clock.

Q. You are just guessing at it?

A. Yes, sir.

Q. Who came there?

A. Robert Hall, Micky Free, and James Yates.

120 Q. These three came together?

A. Yes, sir.

Q. What did they do when they came there?

A. And this Crockett Lee, he came there also.
Q. Who else was there?
A. Barney Dorris.
Q. Was there anybody else?
A. There was Jesse Trout.
Q. Anybody else?
A. George Lock.
Q. Any one else?
A. No, sir; that is all.
Q. Who was running the beer saloon?
A. I was.
Q. Now tell us what these men did when they came there?
A. They came up there, and Jim Yates said, "I want to play a little poker." I said, "It is agin' the law, and you can't have no game here." He said, "I want to play." He says, "You are a damned fool." He says: "This man Hall has got about $250.00; I will give you a cut out of it if you will let me play here." I said "I can't help that; I might be arrested and have to pay a fine for it;" and he said, "I am going to play; if you do not let me play I will close your house up." I said, "All right, then, I guess you will have to play," and I fixed them a table there and they went to playing poker, and I played myself about 15 minutes, and they wouldn't let me play any longer; said didn't want me in the game at all; said they didn't want any gamblers in the game. They played on awhile, and Hall quit, got up, reached over and said, "Jim, I want two dollars," and he took his two dollars and went out. He was gone awhile, and while he was gone Jim Yates said to me, "George, go and fetch Hall back here;" he says, "he has got a roll as big as your leg," and, he says, "I will give you a cut out of it, by God, if I get it."

I told him, I says, "I aint going around to hunt him up; I can't
121 go around to hunt up Hall." Pretty soon Hall came back.

Q. Do you know how he come to come back?
Answer. No, sir; I don't.
Q. Did you go after him?
A. No, sir; I din't go after him.
Q. What else.
A. He came in, and Jim Yates was sitting on the side of the table next to the door, and he walked right along behind him; Jim was in his shirt sleeves, had a pistol on his scabbard, and Hall pulled the pistol out of the scabbard and walked around and set down by the table, and Yates said, "Bob, give me that pistol back here." And Hall said, "What is the matter?" and he said "By God, I don't allow anybody to have my pistol; give it here." And Hall said, "All right," and handed it back to him. They set down and went to gambling again, and Hall taken some matches, I don't know how many now; I don't recollect, took some and they went to playing again.
Q. What did they use matches for?
A. In making change; ten cents a match, as counters.
Q. Go on.
A. Yates was setting at the table holding out cards in his left hand; I suppose there was two inches of the cards out from under his hand, anybody in the world could have seen it. I don't know whether Hall seen

it or not; I suppose he did. Hall made a bet and Yates raised him $1.60, as well as I recollect, and Yates said, "I will bet you some more," and Hall said, "I will call you;" and Yates said, "Get something in the pot;" and about that time Hall dropped the cards on the floor, and Yates said, "What is that you dropped," and he said, "Nothing." And he said, "Come up with it;" he said, "By God, I know it is; I know you did drop something; come up with it." Hall said, "All right; if that is what you want I can come up with it," and he went down this
122 way with his hand, and as he went down Yates raised up like this with his pistol in his hand, and Hall grabbed it. They scuffled around there over it and knocked the lamp off the table, and fell out of doors right by me; they lay on the ground awhile; they both had the pistol; I don't suppose one could get it from the other, and finally Hall said, "Jim, you know there is no use of this." He says, "Let's drop it;" and Yates said, "All right, we will just consider this a drunken row, and say no more about it."

Q. What did they do with the pistol?

A. Hall turned the pistol loose and they got up. Yates said to me, "George, I have lost a 20-dollar gold piece, and I have got to have it or I will kill every damned son of a bitch on the hill." I lit the lamp and found some little change scattered about on the floor, I have forgotten how much it was, and I walked out in front of the door, and Yates backed up, stood right up against the side of the house and Hall was standing there, I don't know how far, I suppose, maybe, 4 or 5 feet from him, and he says, "Bob, you cut me." Bob said, "I didn't;" and he said "you did; you cut me." He said, "You are a damned son of a bitch." As he said that he took a step right towards him and hit him with the pistol. Hall fell and Yates walked up to him and kicked him twice. I won't say whether it was twice or three times that he kicked him, but he gave him as many as two kicks anyhow; he kicked him as many as twice in the side. And he fired his pistol off in the ground right between me and Hall. I was standing about a step of Hall, I reckon.

Q. How near to Hall did he fire the pistol?

A. It must have been two or three feet. He turned around to him and he said: "If you had as much nerve as a setting hen I
123 would blow your brains out." He threw his pistol on his head and I said, "Jim don't do that, you have done killed him now." I carried him in the house and locked the door and got a pan of water and washed his face off, and he had a cut under the eye here.

Q. What became of Hall?

A. I left Hall laying there.

Q. Who went in the house?

A. Myself and Jim Yates.

Q. What became of the other men?

A. There was nobody else there I saw.

Q. What became of the others that were there?

A. Some of them run out of the window and some out of the door.

Q. You didn't see no other men?

A. No, sir.

Q. You went in the house and washed his face?

A. Yes, sir; and he said "You go hunt up Micky Free," and I went out and hollered for Micky; I was out about 100 yards from the house and him and Barney Dorris and Crocket Lee came up and we all took a drink.

Q. What became of Hall?

A. I don't know; he was gone; when I looked back out there he was gone.

Q. You left him laying there on the ground?

A. Yes, sir.

Q. Did you ever see him leave there?

A. No, sir; I never saw him leave there. Barney Dorris, Micky Free, and Crockett Lee came up, and we all took a drink; and about that time there was three Indians rode up, and hollered "Hello." Yates went out with his pistol in his hand and said "Who is this?" He said "My name is Jim." He said "Jim who?" and he said "Walker." He says "That is all right; I thought you was somebody else," and he caught him by the neck, like, and pulled one of them off of his horse and fired his pistol off, come back to the door and told them to get down. He said, "That's
124 all right; I thought you was somebody else." He said, "That is all right; we are friends." He said, "Come in and have something to drink," and I told the man to ride out there about 100 yards and he would find some place to hitch to, and to come back and have some beer, and he rode off and I stepped into the door, and Jim came right into the door and fired his pistol off right through the floor, and he says "Give us some beer." It was him and Micky Free and Crockett Lee came in and I drawed three beers and set them up on the counter, and about that time there was a pistol fired.

Q. Did the Indians come in?

A. No, sir; they rode out southeast of the house.

Q. About the time you set out the beer a pistol fired?

A. Yes, sir. And Jim said, "There, that son of a bitch comes now," and pulled his pistol and went out, left his beer setting on the counter; some of them went out of the window; I don't know who it was now; I believe now, though, it was Barney Dorris, and Micky Free went out of the door right ahead of me, and I went out after him, and he walked right out by the corner of the house and fired his pistol off, and squatted down to listen.

Q. Who did?

A. James Yates. He walked a little further and he fired again, squatted down and listened. I went to him, and I said, "Jim, stop this; I will be closed up here; come on and behave yourself," and he said, "I won't do it; don't bother me at all." And he went on and fired four shots, and stopped and loaded his pistol. He was then going southeast, a little southeast of the road that was running north and south; when he loaded his pistol he turned back into the road.

Q. (Witness is shown diagram.) Where was the beer house where you had the beer and the fight occurred?

125 A. The houses on this map are not located right. There are three houses here where there ought to be two.

Q. We will leave this one off.

(Witness locates beer stand on map.)

Q. How far is it down to this house?

A. I don't know how far it is; I guess maybe 200 yards.

Q. Where did these Indians come from?

A. They came right up from this direction, came right up this road from the north; the first I seen of them they were right at the northwest corner of the house.

Q. Where was it that Yates went up to them and pulled one off his horse?

A. Right at the northwest corner of the house.

Q. Which way did they go?

A. They went out here in a southeast direction.

Q. After Yates run out with his pistol which way did he go?

A. He left this road; he came up here a little east of the road, and he got here where there was some rocks in the road.

Q. West of the road that went south to the other house?

A. Yes, sir; right there he stopped; I suppose it is 25 or 30 yards from the house, stopped and reloaded his pistol there.

Q. That is 25 or 30 yards east of the road?

A. Yes, sir; and he turned around and came back into the road by these rocks.

Q. That is the road leading down towards that other house to Southtown?

A. Yes, sir.

Q. He came into the road there about those rocks; then what did he do?

A. He started right on down the road.

Q. What did he do, if anything?

A. He was shooting all the way, all along.

126 Q. How far did you go down that way with him?

A. I didn't go but a few steps.

Q. Didn't you say you went with him to the rocks?

A. Yes, sir.

Q. How far beyond that towards the other house did you go, or did you go any further?

A. I didn't go any further.

Q. What was he doing when you left him?

A. He was shooting.

Q. Standing still, or walking, or running?

A. He was walking right south, down the road.

Q. What else did you observe?

A. I went back up towards the house and stopped in the road.

Q. What else did you observe with regard to Yates? You say that he walked on down. Did you observe anything else?

A. No, sir. Well, after that shot there was somebody else shot.

Q. Did you see anybody else shoot?

A. I saw the bulk of somebody; I don't know who it was.

Q. Where was the bulk of that somebody?

A. It was right down the road here [indicating on map.]

Q. Where was the bulk of this somebody with regard to this other house?

A. It is a little north of that house.

Q. You saw the bulk of somebody?

A. Yes, sir.

Q. What else?

A. I went back up, I suppose 10 or 12 yards of the house, and stopped in the road and knelt down just like this, down the road like, and a ball struck the ground right in front of my face, and it scared me and I got up.

Q. Will you tell the jury what you saw when you stooped down like that way?

A. I saw two men shooting.

Q. Well, how far apart were the two men, or could you say?

A. They looked to be 25 or 30 yards apart; it looked to me
127 like they were both walking up on one another. I was right in line with them, right north of them.

Q. What else did you see?

A. I set there until this ball hit the ground, and I got up and moved back to the corner of the house, and by this time a ball struck the house, and then I seen the man fall in the road.

Q. What became of the other man?

A. The other man walked right off west to the house of Ada Bullen's, went to her house. I walked right northwest and went to Bill Smith's house; it is northwest of there about half a mile, I guess. I waked him up, and told him that I thought that Jim Yates was killed, and to come and go up there with me.

Q. I will ask you if you saw and heard any other shooting than this shooting of these two men you speak of?

A. Yes, sir; there was three Indians shooting out there right southeast. I guess they fired 18 or 20 shots.

Q. When were they shooting?

A. They were shooting the same time the other men were shooting. They commenced shooting first.

Q. Which way was Yates shooting when he first commenced shooting? You say that he went out and squatted down and commenced shooting?

A. The first shot that he fired, I don't know which way he fired, and the next shot was fired southeast.

Q. Was that in the direction of these Indians?

A. Yes, sir.

Q. How far was he out from the east of the road?

A. I guess 10 or 12 steps.

Q. It was there he turned and went back into the road about these rocks?

A. Me and him both turned back there; I caught up with him right there, and he loaded his pistol.

128 Q. Which way did he shoot then?

A. He shot south.

Q. Which way did he shoot with regard to the body of the person you saw down towards the other house?

A. The body I saw at the other house was coming up north.

Q. Which way did he shoot with regard to that body?

A. He was shooting right towards it.

Q. Could you tell which way the Indians were shooting?

A. They were shooting right at Yates; me, too. I was right along with him.

Q. After that you say you went to Bill Smith's?

A. Yes, sir.

Q. I will ask you if you saw Hall, the defendant, any more?

A. Yes, sir; I woke Bill Smith up; and I told him that I thought Jim Yates was killed, to come up there with me; let's go up there.

Q. Who was in the house with him?

A. His wife.

Q. Where is Bill Smith?

A. He is dead.

Q. Where is his wife?

A. She is here.

Q. You woke Bill Smith up?

A. Yes, sir.

Q. Go on.

A. We walked out in the road there and was standing there talking; I didn't like to go up there much; that we had better go to town and get somebody; and while we were standing there talking, up comes Hall. He said, "Who's that?" I said, "It is Perry." He said, "That is all right; who's this over here?" I said, "That is Smith." He said, "That is all right, too." He says, "I am shot, have got a ball in my arm; come and go down here and cut it out for me."

Q. Did you see any wounds on him?

A. Yes, sir; we cut a ball out of his arm; I held the arm, and Bill Smith cut it out.

Q. Where was the ball?

A. In the right arm, I think, somewheres; and it was lodged away up here.

129 Q. Who was it cut it out?

A. Bill Smith cut it out.

Q. Did you learn from Hall how he got shot?

The DISTRICT ATTORNEY. Never mind that.

Mr. FREDERICK (of counsel for defense). If the court please, can't I ask him that?

The COURT. No; it is a past occur'ence, coming from a defendant.

Mr. FREDERICK. There was a bullet hole in his arm, and you and Smith cut that out?

A. Yes, sir.

Q. What kind of a ball was it?

A. A good big one.

Q. You know something about the cal*i*bre of balls?

A. It was about a .45, I guess.

Q. What else was done there?

A. We cut the ball out and dressed his arm, and he says, "I have got to leave here until this excitement is over." He says, "I haven't got any money——"

The DISTRICT ATTORNEY. Who said that?

The WITNESS. Mr. Hall.

The DISTRICT ATTORNEY. The court has just ruled out the question you have asked him.

Mr. FREDERICK. Did he get any money? I will ask you whether you know whether he had any money, whether he got any?

A. Yes, sir; he got a little, but not much.
Q. Tell how much and who he got it from.
A. I gave him a dollar, and I think Bill Smith gave him some.
Q. Did he gave him anything else?
A. He gave him some bread and a vest.
Q. Who was it gave him the bread?
A. Bill Smith.
Q. Who gave him the vest?
A. Bill Smith.
Q. How long did he stay there?
130 A. I guess he staid there 25 or 30 minutes.
Q. What became of him?
A. He said he was going to Southtown, or Northtown, I mean, and take that passenger train, three o'clock train going to Muskogee.
Q. Did you tell him anything at that time about seeing the shooting or anything?
A. No, sir; I didn't tell him anything about it.
Q. Where did you go then?
A. I went then to Southtown.
Q. What for?
A. I went there to get somebody to help me to take Jim Yates into a house there.
Q. I will ask you which way you went; did you go back up where Yates was?
A. No, sir; I went right up the railroad.
Q. When did you get back, or did you get back at all, where Yates was?
A. I went down to Southtown, and hollered at Gleason's restaurant ank asked him where Dad Depew and Salomon was, and he said they had just gone up the hill, and I said, "I was just hunting for them." And I went back up there myself.
Q. Who did you find there?
A. I found Jim Yates laying there in the road.
Q. Who else?
A. Ada Bullen and Clyde Burke, I believe her name is.
Q. The two women that stay up there?
A. Yes, sir.
Q. Anybody else?
A. They were at the house; nobody else there that I saw.
Q. Did you go in the house?
A. No, sir; I went in four or five steps of it.
Q. Did any one go with you?
A. Yes, sir; Ada and Clyde both went with me.
Q. What time was this?
131 A. I guess it must have been about 4 o'clock.
Q. You didn't have any timepiece, did you?
A. No, sir.
Q. How near daylight was it?
A. It wasn't long until day. It was pretty close to day.
Q. You know what the appearances are when you see day breaking, do you?

A. It wasn't hardly daybreak; it was pretty near day, though.

Q. When did you go to the defendant's body?

A. I never went to his body until between daylight and sun up.

Q. How long until anybody else came, after you got back there?

A. Just about daylight Dad Yandell and Dad Depew, and 12 or 14 came up there; I don't know who they were, and they taken the body in the house.

Q. I will ask you hoe he was wounded?

A. He had one shot went right in the point of the shoulder here, went down through the neck and one right about the left nipple here.

Q. You think one shot went in on the right shoulder here?

A. Yes, sir.

Q. Another on the left nipple?

A. Yes, sir.

Q. How did that shot range that went in on the right shoulder; did it go through the body?

A. No, sir.

Q. Didn't go through the body?

A. No, sir.

Q. Didn't it make a sign on the other side of the neck?

A. No, sir; not that I saw. Went in the point of the shoulder here and came out down here, broke the skin and went in again.

Q. You don't know whether it came out on the other side or not?

A. There was no hole there.

Q. Did you look?

132 A. Yes, sir; I looked at it; I didn't see no hole at all.

Q. Did you examine to see whether it went out on the other side or not?

A. I didn't examine close; I looked at it. I didn't see but two holes, is all I saw.

Q. You don't know whether it went in on the right shoulder or left side, did you?

A. I don't know; I suppose it went in on the right shoulder.

Q. Do you know who had been up there after the shooting, and who first came up there, except these two women you speak of?

A. No more than what I heard is all.

Q. How long was it from the time you saw Hall down at Smith's when you cut the ball out of his arm, until daylight?

A. I guess it was about an hour and a half or two hours.

Q. How long after Hall left, after you cut the ball out of his arm, until you went down to Southtown?

A. I don't suppose I staid there more than three or four minutes after he left.

Q. You went on the railroad to Southtown?

A. Yes, sir.

Q. How far did you have to go?

A. A mile.

Q. How long did you remain down there?

A. Not very long. I went up and woke Gleason up, and he told me they had gone on up on the hill, and then I went back on the hill.

Q. And after you got up there how long until these people came at daylight?

A. I suppose something over an hour.

Q. Then you had been up there about an hour maybe, and these two women too, before anybody came?

A. Yes, sir.

Q. You remained up there?

A. Yes, sir.

Q. What did you do up there?

A. We didn't do anything, only set down on some rocks there.

Q. In the house?

A. No, sir; out about 30 or 40 yards from him.

133 Q. You and the two women?

A. Yes, sir.

Q. Did you see anyone else during that time?

A. No, sir.

Q. You didn't go about the body?

A. No, sir.

Q. What became of Yates's 20-dollar gold piece he said he lost?

A. I don't know.

Q. When you took the lamp and went in the house you say you found some change?

A. I found 30 or 40 cents; there may have been as much as 60 cents.

Q. Did you find any other peice of money?

A. No, sir; never found no old peice.

Q. Did Yates hunt any further for it?

A. No, sir; he told me, he says "You have got to find that money for me, I have got to have that money, or kill every son of a bitch on the hill."

Q. After that did you hear anything more about it?

A. No, sir; he didn't hunt any more that I know of.

Q. Did he hunt any more or say anything about it?

A. I never heard him say anything more about it.

Q. You don't know whether he found it or not?

A. No, sir; I do not know whether he got it or not.

Q. I will ask you if Hall lost anything up there?

A. He lost some money in the game; I don't know how much.

Q. What became of Micky Free, Barney Dorris, and Crockett Lee? You say when this shooting commenced they run off; did you see them any more?

A. Croket Lee and Dorris went out of the door, and Micky Free went out of the window.

Q. Did you see them any more?

A. I never saw them any more until next morning about 9:00 o'clock.

Q. You don't know where they went to?

A. No, sir.

134 Q. Where did you see them next morning?

A. I was up there on the hill, and they came up about 9:00 o'clock.

Q. Together?

A. No, sir; Micky Free came by himself, and they came by themselves, all three of them; Barney Dorris came first and Crockett Lee next and Micky Free last.

Q. What clothes did the defendant have on when you saw him that night at Bill Smith's? You say that Smith gave him a vest. Did he have on a coat?

A. Yes, sir; he had a coat on.

Q. What color?

A. I don't know what color; it was a dark coat; I don't know what color it was.

Q. When he was up there that night and Yates knocked him down and kicked him did he have on any coat?

A. No, sir; never had on any coat then.

Q. What kind of a shirt did he have on when you saw him at Bill Smith's?

A. He had a white shirt on.

Q. A clean shirt?

A. Yes, sir.

Q. You didn't tell him, or let him know, that you had seen any shooting up there, or anything about Yates, when he was at Smith's?

A. I don't think I said anything about it to him.

Q. Do you know whether or not—did you know then whether or not Hall was the party, the man, that had the difficulty with Yates, the man that done the shooting with Yates. Did you know who it was?

A. Of course I didn't know who it was.

Q. Did you learn from him who it was; from Hall at Smith's?

The DISTRICT ATTORNEY. Never mind.

Mr. FREDERICK. Did you learn from him who it was up there that was in the shooting scrape with Yates?

A. Yes, sir. He said he had a shooting scrape with him.

The COURT. That would go out; that is excluded.

135 Q. Then you don't know of your *onw* knowledge who it was shooting with Yates up there?

A. No, sir.

Q. You say you saw the man fall?

A. Yes, sir.

Q. Who was it?

A. Jim Yates, I guess.

Q. Whereabouts did you find Yates?

A. I found him laying right wher' I saw the man fall.

Q. I will ask you whether or not there was any shooting after Yates fell?

A. No, sir; I never heard any more shooting.

Q. Did you see any more?

A. No, sir.

Q. After Yates fell you say the man then left the road and went over to Ada's?

A. Yes, sir; went right due west.

Q. When they got into the game of cards there that night I will ask you if the game was a continuous one, or did they stop at any time?

A. Yes, sir; they played awhile and they stopped and Hall went off.

Q. Did you say that Hall went off?

A. Yes, sir.

Q. Yates wanted you to go and get him to come back?

Q. How far is it from South McAlester to old McAlester?
A. About a mile and a half, I believe.
Q. Do you know this defendant?
A. Yes, sir.
Q. What name did he go by when you knew him up there?
A. Robert Marshal, I believe.
Q. Where did he live?
A. He lived there at South McAlester.
Q. Did you know James Yates in his life time?
A. Yes, sir.
Q. Is he alive or dead.
A. He is dead, I guess.
Q. Where did he live?
A. He lived there at South Town.
Q. South McAlester?
A. Yes, sir.
Q. The defendant is charged with killing James Yates on the fourth of last August; I will ask you if you saw the men together that night.
A. Yes, sir; me and him and Yates were together that evening.
Q. Where were you?
A. We started from South McAlester.
Q. Where did you go?
A. We went up on the place they call Chippy Hill.
Q. To whose house?
73 A. Some woman up there run a store or saloon; her name was Lou. I don't know her other name.
Q. It was Lulu's house?
A. Yes, sir.
Q. I believe they call her Luly May, or something?
A. Yes, sir; I believe that is her name.
Q. Did you see George Perry that night?
A. Yes, sir; he was 'tending bar there.
Q. Who went up there with you?
A. Me and Bob Marshall and James Yates.
Q. What time did you get there?
A. I expect it was 9:00 o'clock, or after.
Q. What did you do while you were there?
A. We got up and commenced playing cards.
Q. What game?
A. Playing poker.
Q. How many of you?
A. Four of us started in.
Q. All four of you?
A. Yes, sir.
Q. Go ahead.
A. We commenced playing there for a little money, and for the drinks at the same time.
Q. What were you drinking?
A. Drinking Choctaw beer, and some whiskey we had there with us.
Q. This Lulu's house is——you say there is a bar there?
A. Yes, sir.

Q. She is a chippy, is she not?

A. Yes, sir; that is what they say.

Q. You don't know, except what they say?

A. I don't know whether she is or not.

Q. If there was any trouble while you were in the game of cards, you may go on and tell us all about it, and what it was commenced and all about it?

A. I don't know what time it was when they commenced fussing; I expect it was 12:00 o'clock, or after; Yates and him was playing a hand——

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Q. Yates and who?

A. Yates and Bob Marshal, the defendant. And I believe that Yates bet Hall a dollar, or something—I have forgot how much it was—and the defendant said he only played what money he had before him; and Yates said, "You have got the money in your pocket; go on and play your money," and I believe he made the remark, he said "Them under the table plays, too." He thought that he had discarded some cards more than he ought to have had, and he said "All right."

Q. How did that happen?

A. I believe he had too many cards, and he slipped his hands down and dropped them under the table.

Q. Hall had too many cards in his hand?

A. Yes, sir.

Q. And he slid his hand over?

A. Yes, sir; and held his five, and dropped the other two or three; I don't know how many it was.

Q. You say that he held his five?

A. Yes, sir.

Q. Five what?

A. Five cards.

Q. In playing poker do they play with five cards?

A. Yes, sir; that is what they are supposed to hold, at least.

Q. If a man has more than five cards—picks up more than five—does that give him a disadvantage or an advantage?

A. You can't win with them when you have got too many cards.

Q. You have lost what is on the table?

A. Yes, sir.

Q. He has got to lay down his hand?

A. Yes, sir; he has got no chance to take up any money with it?

Q. Then if he slips two or three cards, drops them on the floor, and holds his five, and his opponent does not know it, he can go on and play them?

A. Yes, sir; certainly.

Q. That is fraud?

A. It is not playing square.

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Q. You say that the defendant had picked up too many cards and dropped some of them on the floor?

A. Yes, sir.

Q. What remark was made, you say?

A. Jim Yates said, "Them under the table plays' too."

Q. He saw him drop them?

A. He said, "Go and get him to come back; he has got a roll on as big as your leg; I will give you a cut out of it."

Q. After Yates had knocked Hall down there and kicked him, I will ask you if Yates left there at any time between that time and the time of the shooting?

A. Yes, sir; he went off.

Q. Did he go alone or with anyone?

A. I think Mickey Free went along with him.

Q. Do you know where he went?

A. No, sir.

Q. How long was he gone?

A. I suppose about half an hour.

Q. What did he go for?

A. He said he was going to hunt Hall.

136 Q. You say that you loaded Yates' pistol; how many times did you load it for him; how many times did he load it?

A. He held it in his hands, and I put the cartridges in it.

Q. How many times did you load it that way?

A. I think I loaded it three times. I know I loaded it three times for him.

Q. Where did you get the cartridges?

A. Out of his belt.

Cross-examination:

By the DISTRICT ATTORNEY: You are the man they call Big George, are you?

A. I guess so.

Q. You went yesterday and got Micky Free to go over to the defendant's attorney's office, didn't you, to see him?

A. I met him on the street and told him that Mr. Rutherford wanted to see him.

Q. Twice did you tell him that; two occasions?

A. I don't think I did.

Q. How did you know that Mr. Rutherford wanted to see him?

A. He asked me if Micky Free had come in, and he said, "I would like to see him."

Q. When did he say that?

A. I believe it was yesterday morning or the day before.

Q. It was day before yesterday (Saturday) was it?

A. It may have been.

Q. Then you must have been at their office day before yesterday.

A. I have been there often.

Q. How often have you been there?

A. I could not say; every time I come to town.

Q. How often have you been there during the time you have

137 been here on this case?

A. I don't know; I have been up there several times.

Q. And talked about the case to them?

A. Yes, sir; I have talked some.

Q. Then you talked with them about the case before yesterday, didn't you?

A. Yes, sir; I talked to them about the case when they were defending me.

Q. I mean this term before yesterday.

A. Yes, sir; I have talked to them several times.

Q. I closed my case with the exception of one or two witnesses Saturday night; you talked with them before that?

A. Yes, sir; I have talked to them several times, four or five times, four or five months ago, about the case.

Q. You were arrested for this crime, and brought down here yourself?

A. Yes, sir.

Q. Had you a trial before the commission?

A. Yes, sir.

Q. As being an accomplice with this defendant?

A. Yes, sir.

Q. What was your business up on Chippy Hill?

A. I was running a Choctaw beer saloon up there.

Q. For whom?

A. I was running it for myself, I guess.

Q. I guess not. Who did you run it from?

A. I don't know; Lou Mays loaned me money to run it on.

Q. Who she?

A. She is a woman that stays up there.

Q. She is a whore, is she not?

A. Yes, sir; I suppose so.

Q. She rented the house, did she not?

A. I don't think there has been any rent paid on any of the houses.

Q. Did I ask you that? Will you be kind enough to answer my question: who rented the house?

A. I don't know anything about it.

Q. You didn't rent it?

138 A. No, sir; I don't know anything about the rent at all.

Q. If you were running your own business you ought to know something about your own business?

A. I know that anybody moved into these houses when they got ready.

Q. I ask you if the house, at the time you moved into it, was not in the possession of Lulu Mays, a whore; if she did not have control of it?

A. I don't know; I was controlling it myself.

Q. Before you moved into it?

A. No, sir; not before I moved in. Before I moved into it there was nobody lived there.

Q. Lulu put up the money, did she?

A. Yes, sir.

Q. She furnished the money, and you furnished the brain; is that the way of it?

A. Yes, sir.

Q. How much money did she let you have?

A. I don't know; she let me have money several times.

Q. How much? It seems that the thing was not self-supporting if she had to let you have money several times.

A. I don't know how much she let me have.

Q. How many rooms were in the saloon?

A. One.
Q. Didn't you have two in it?
A. No, sir.
Q. Where did you sleep?
A. I slept down there to another house.
Q. Did Lulu sleep down there at that other house?
A. No, sir.
Q. Where did she stay?
A. She had a house of her own she staid in.
Q. Were there other houses that were kept by Lulu?
A. I believe she had four at that time.
Q. What woman staid there in the house you staid in?
A. There was no woman at all.
Q. You were batching, were you?
A. No, sir; I slept there by myself.
Q. Who was doing your cooking for you?
A. Barney Dorris was doing the cooking.
139 Q. She is another whore is she not?
A. No, sir; she is a man.
Q. Who is his wife—the woman that he is keeping there?
A. I don't know whether he has got any wife. I have heard that Lulu Mays is his wife; I don't know whether she is or not.
Q. You deny that you were running that saloon for Lulu, do you?
A. I don't know; she was furnishing the money, and I was running it.
Q. You said you were running it for yourself awhile ago.
A. I controlled it myself.
Q. That does not make any difference who controlled it; what was your contract?
A. My contract was to give her half the profits.
Q. You were in partnership with a whore, then?
A. Yes, sir.
Q. That is all to the discredit of Lulu?
Mr. FREDERICK. I object to the remark of counsel.
The DISTRICT ATTORNEY. It does not amount to anything. He is my witness; not yours.
Mr. FREDERICK. I object to his cross-examining him, then. Whether he is or not, I think it is best that witnesses should be asked questions and let them answer them without any comment from counsel.
The DISTRICT ATTORNEY. You were running a partnership with Lulu on Chippy Hill?
A. Yes, sir.
Q. That Chippy Hill is the place where the whores live who furnish the two McAlesters with houses of prostitution, is it not?
A. Yes, sir.
Q. Did you do anything else besides run a saloon for one of them?
A. No, sir; not at that time I didn't?
Q. Were you engaged at any time in collecting money for them,
140 drumming for them?
A. No, sir.
Q. I suppose you drummed a little for them while you were running the saloon?

A. No, sir; I didn't drum for them at all.
Q. You are quite certain of that, are you?
A. Yes, sir; I didn't.
Q. Was there anybody lived in the house with you where you slept?
A. No, sir.
Q. You slept in one house and run a saloon in the other; what kind of a saloon did you run?
A. Choctaw beer, blackberry ginger, and soda water.
Q. You were brought down here?
A. Yes, sir; I was brought down here and plead guilty to selling Choctaw beer.
Q. You plead guilty to selling that stuff that causes drunkenness around. How many times were you brought here upon that charge?
A. One time.
Q. What time did these men come to your saloon?
A. I suppose about 8 o'clock.
Q. You told them they must not play cards?
A. I told them that; yes, sir.
Q. Because it was against the law?
A. Yes, sir.
Q. How long was that before you plead guilty to violating the law for selling beer there?
A. It was in August and I plead guilty in November, I think.
Q. Six months afterwards you plead guilty to violating the law yourself?
A. Yes, sir.
Q. You didn't want them to gamble in your house?
A. I always plead guilty when I am guilty.
Q. How many times have you plead guilty?
A. I have plead guilty in this court once.
141 Q. What other court have you plead guilty in?
A. I have had little scraps before justice of peace courts several times.
Q. Were you ever convicted of any office besides these little scraps?
A. No, sir.
Q. You never was in jail?
A. Never in any—— I was in this United States jail, and I was in the county jail here once.
Q. What were you in the county jail for?
A. I was in for a fine for gambling.
Q. How long were you in the county jail?
A. I was in there two or three days.
Q. Were you in there for anything else besides gambling?
A. No, sir.
Q. Were you ever in any other jail?
A. No, sir.
Q. What time did these people come there to your house?
A. A. They came there about 8.00 o'clock; I think about 8; I didn't have any time piece; I don't know what time it was.
Q. You say that Yates was drunk?
A. He was drinking; yes, sir.

Q. How about the defendant?
A. He was drinking some, too.
Q. Which was the drunkest?
A. Yates, I believe, was. He acted like it.
Q. They commenced playing cards?
A. Yes, sir.
Q. And you started to play with them for awhile?
A. Yes, sir; I played for about 15 or 20 minutes.
Q. Did you loose any money?
A. I lost a dollar.
Q. That is all you had, was it?
A. No, sir.
Q. How much more did you have?
A. I don't know; I gave Bob a dollar after that. He told me to *w*uit, that he was not going to have any gamblers in the game. Yates
142 said, "I don't want any gamblers in the game; you get out; I will give you your cut all the same.
Q. You were a gambler at that time?
A. I have gambled off and on awhile.
Q. You would not want to play cards with a fellow that did not have any money, would you?
A. No, sir; I don't care to play for fun much.
Q. After they were playing awhile you say that Yates was setting there drunk with a hand of cards in his left hand sticking out an inch and a half or inch and a quarter so anybody could see it. Is that right?
A. Yes, sir; that is the way he held it all the time.
Q. So anybody could see his hand?
A. Yes, sir.
Q. The defendant had a hand of 6 or 7 c'rds in it, did he not?
That was the second game they were playing he held out one card.
Q. Who did?
A. Bob Hall.
Q. He played six cards on him the second game?
A. Yes, sir.
Q. How do you know that?
A. I saw him holding out the cards.
Q. That is cheating, is it not?
A. Yes, sir; that is what is called cheating.
Q. A man is more apt to get a pair or to get threes with six cards in his hand than five, is he not?
A. Yes, sir.
Q. It is a stronger hand, of course?
A. Yes, sir.
Q. It was the second game. How many games did they play?
A. They only had two sets.
Q. You mean that it was the second set?
A. Yes, sir; and the second hand.
Q. That is when Yates was getting pretty drunk, was it not?
A. He was drinking when he came up there
143 Q. Did you notice Hall any other time hold more than five cards?

A. No, sir.

Q. Did you notice him drop any cards?

A. Yes, sir; I noticed him drop cards on the hand that the fight came up on.

Q. Yates caught him at it?

A. He says, "What is that you dropped?"

Q. He caught him dropping that card?

A. Yes, sir.

Q. When Yates asked him what was that you dropped what reply did the defendant make?

A. Yates said, "What is that you dropped?" and he said, "Nothing."

Q. The defendant said "nothing?"

A. Yes, sir.

Q. You did see him drop a card, didn't you?

A. I saw him drop a card; yes, sir.

Q. But he told Yates he dropped nothing?

A. Yes, sir; Yates said, "Yes; you did; I heard it drop; come up with it."

Q. Then what?

A. He says, "All right," and he goes down with his hand like this, and Yates raised up and drew his pistol.

Q. Did he just say, "All right," or did he say, "All right; I can come up with it?"

A. He said, "All right; I will come up with it," and went down with his hand like this, and Yates raised up and drew his pistol.

Q. What was the defendant's manner when he said "all right; I can come up with it?"

A. I don't know. He was laughing. I do not know whether he was mad or not.

Q. What did he go after?

A. I don't know whether he went after the card or what he went after.

Q. Did he get the card?

A. No, sir. Jim Yates pulled his pistol, and he grabbed the pistol, and they went to fighting over the pistol.

144 Q. Don't you know that he went for his knife?

A. I don't know whether he did or not; I didn't see any knife at that time.

Q. You have not stated that you saw his knife at any time yet?

A. No, sir.

Q. I gather from what you say that you did see his knife at some time?

A. I did see his knife at another time.

Q. He run his hand down this way, and said "I can come up with it?"

A. Yes, sir; he said "All right; I will come up with it;" and he reached down like this.

Q. You can not state what he went for?

A. No, sir; whether he went for the card or what he went for.

Q. It was not that he went down in that way until Yates drew his pistol?

A. No, sir; as he reached downed Yates reached and drew his pistol.

Q. The defendant grabbed the pistol?

A. Yes, sir.

Q. Then they scuffled?
A. Yes, sir.
Q. Scuffled until they got out of doors?
A. Yes, sir; and knocked the lamp over, and fell out of doors, both of them.
Q. Did the lamp go out?
A. Yes, sir.
Q. After they scuffled around awhile they agreed to quit?
A. Yes, sir.
Q. And call it a drunken row?
A. Yes, sir; and say nothing more about it.
Q. They agreed to that?
A. Yes, sir.
Q. You got the lamp after awhile and went to looking for the money; the man said he had lost some money; you found 20 cents?
A. I might have found as much as 60 cents—somewhere along there.
145 Q. It was some small change, anyhow?
A. Yes, sir.
Q. Did you find anything else?
A. Not in the house; after I walked out doors I found a knife laying on the ground.
Q. Why didn't you tell that before? You told about lighting your lamp and looking for things, and finding 60 cents in money; why didn't you tell you found the knife?
A. I never thought about it I reckon.
Q. A knife is such a trifling thing in a fight that when you find a knife after a fight is over you don't think enough about it to tell about it?
A. If I had thought about it I would have told about it.
Q. What kind of a knife was it, Mr. Perry?
A. It was a dirk knife; looked to be. I never picked it up?
Q. A dirk knife is a knife that has a spring in the back?
A. This was a knife that didn't have any spring at all.
Q. It was a knife that had a guard on it?
A. Yes, sir.
Q. Sharp on both edges, running down to a point?
A. Yes, sir.
Q. The blade six or eight inches long?
A. I don't know how long it was; good long knife.
Q. Was it a bowie knife or a dagger?
A. You can call it a bowie knife or a dagger; that is the kind of a knife it was.
Q. Was it a knife something like this diagram I have drawn here?
A. Yes, sir; that looks something like it.
Q. Where did you find that knife?
A. It was laying on the ground out in front of the door, right where Yates and Hall were laying when they were scuffling over the pistol.
Q. How long did you say the blade of the knife was?
A. I don't know how long it was.
145½ Q. Do you think it was 8 inches long?
A. It wasn't 8 inches long; that would be a considerable of a long blade.

Q. Was it 6 inches?
A. Four inches is a good long blade.
Q. What became of that knife?
A. Bob Hall picked it up.
Q. The defendant picked it up.
A. Yes, sir.
Q. Did he put it in his boot?
A. I don't know where he put it.
Q. Did he put it in his boot or hold it in his hand?
A. I seen him pick it up; the last I saw of it it was in his hand. I don't know whether he put it in his boot or not.
Q. He had it in his hand when Yates struck him, did he not?
A. I think he did; I didn't see it; he had his hands behind him.
Q. Was Yates there when he picked it up?
A. Yes, sir.
Q. Saw him do it?
A. Yes, sir.
Q. After they had this difficulty Yates did not say anything that was harsh until he picked up this knife, did he?
A. No, sir.
Q. When he went out there after going in the house the defendant was standing out there with his hand behind his back?
A. Yes, sir.
Q. Where was his knife then?
A. I don't know whether he had it in his hand or not; I can not say. I was standing in front of him.
Q. You said awhile ago that you thought he had it in his hand when he struck him?
A. I don't know what he done with it; I never saw him put it away.
Q. Why did you think that he had it in his hand?
A. I never saw him put it anywhere.
Q. You saw him with his hand behind his back when Yates struck him?
A. I saw him standing there——.
Q. It was after Yates knocked him down that you washed Yates's
146 face off; you said that he was cut right under the eye. How big a cut?
A. Small cut.
Q. Did it look like a knife had gone in that way?
A. It wasn't much of a cut.
Q. It looked like a stab rather than a cut, didn't it?
A. It wasn't stabbed deep: it was right along under the eye.
Q. It was on that bone, was it not?
A. No, sir; it was a little higher, here in this sink, as near as I can recollect.
Q. He told him that he had cut him?
A. Yes, sir.
Q. How long was that after he had picked up the knife that Yates told him that he had cut him?
A. Two or three minutes.

Q. That is the way that occurred: You went out there and you found this knife; when you found the knife the defendant picked it up. Did he say anything about loosing the knife until you went out there?

A. He never said anything about loosing the knife.

Q. Did he say anything about the knife at all?

A. No, sir.

Q. Just picked it up?

A. Yes, sir.

Q. Didn't put it away, but held it in his hands?

A. He picked it up; I don't know whether he put it away or not. The last time I saw it it was in his hand.

Q. Did you take a drink after the first fight and before Yates knocked the defendant down?

A. No, sir.

Q. Yates knocked the defendant down and kicked him, you say?

A. Yes, sir; kicked him twice in the ribs, the right side.

Q. Then he walked in the house and told him if he had any courage he would kill him?

A. He never walked into the house; I carried him in the house.

Q. Carried Yates in?

A. Yes, sir.

Q. You mean you got him to go in?

147 A. I throwed my arms around him and got him in.

Q. Where did the shot go in the ground that he fired in the ground?

A. It went in about three feet from where Hall was laying there.

Q. Three feet of his side?

A. Yes, sir.

Q. He just fired the shot right down into the ground?

A. Yes, sir.

Q. Didn't fire it at all?

A. No, sir. He didn't fire at Hall.

Q. When you went in the house you washed his face off?

A. Yes, sir.

Q. Was it bleeding?

A. Yes, sir; bleeding some.

Q. Why didn't you go out and get this man he had struck and knocked down?

A. I didn't want Yates to kill him; I thought that Yates had just about killed him, and I wanted to get him away from him.

Q. Why not go out and see the man?

A. I could not go out without Yates going out with me.

Q. You were awful afraid of Yates, were you?

A. Yes, sir; I was afraid of him.

Q. After this you went inside and took a drink and washed him off, and then Yates went out to look for the knife again?

A. No; Yates never went out to look for the knife that I know of. He never went out until these Indians rode up.

Q. He then went out and had a talk with the Indians?

A. Yes, sir.

Q. Did they come in and take a drink?

A. No, sir.
Q. They rode off?
A. Yes, sir.
Q. Did you tell them where to go to hitch their horses?
A. Yes, sir; I told them where to go and then to come back and get something to drink.
148 Q. They went off and in a little while they commenced shooting?
A. Yes, sir.
Q. Is that right?
A. Yes, sir.
Q. Did Yates go out of the house when they commenced shooting?
A. Yes, sir; he went out the first shot they fired.
Q. Then what?
A. He commenced to shoot too.
Q. I understood you to say that they commenced shooting, and after a while there was another shot that whistled by the house; is that right?
A. No, sir; I never said anything about that.
Q. Is that true?
A. Not that I recollect of.
Q. Then he went out and commenced shooting; who was he shooting at?
A. I don't know.
Q. The first shot he fired?
A. I don't know which way it went——
Q. He went out first and squatted down; is that it?
A. He squatted down after he shot.
Q. He shot and then squatted down?
A. Yes, sir.
Q. Which way did that shot go?
A. I don't know which way the first shot went.
Q. Which way did the next one go?
A. It went southeast towards the Indians.
Q. The next one?
A. It went that way.
Q. The Indians were firing at him were they?
A. Yes, sir.
Q. Then what?
A. He probably shot four shots, and then he stopped and loaded his pistol.
Q. You helped him load?
A. No, sir; I didn't help load it then.
Q. You had loaded it before that?
A. Yes, sir; three times before that.
149 Q. He loaded his pistol again?
A. Yes, sir.
Q. How many shots had the Indians fired?
A. I don't know; I expect they fired maybe 18 shots or more.
Q. He was close to the house at that time?
A. He was about 30 yards from the house.
Q. When he fired his pistol towards the Indians?
A. Yes, sir.

Q. Were the Indians between the two houses?
A. They were between the two east houses.
Q. He was shooting as he was going towards them?
A. Yes, sir.
Q. How many shots did he fire as he was going towards them?
A. Four shots.
Q. How many shots did he shoot at them before he started out towards them?
A. I don't know; he fired one shot before I got out of the house.
Q. That would make five shots?
A. Yes, sir.
Q. The Indians were firing at him, and they commenced the shooting?
A. Yes, sir.
Q. While they were shooting at Yates the defendant came upon the scene, and it was the defendant who killed Yates; is that it?
A. I never saw him at all until we got right back and right in the edge of the road by these rocks.
Q. Were you with Yates when he was going out firing at those Indians?
A. I caught up with him just as he went to load his pistol.
Q. What did you go out there for?
A. I tried to get him to come back.
Q. Were you afraid the Indians would hurt him?
150 A. A little; not much.
Q. How many shots had the Indians fired at Yates—these men who commenced firing at him that evening?
A. I don't know.
Q. About how many—a dozen?
A. I expect they had.
Q. Did they quit firing when Yates did to load his pistol, or still fire?
A. Still firing.
Q. Did you hear the balls whistle by you?
A. Yes, sir.
Q. Did you have a pistol?
A. No, sir.
Q. Where was your pistol?
A. I didn't have any.
Q. Then he retreated; did he?
A. Yes, sir. He turned back then into the road.
Q. While they were still firing at him he was out of the road, was he?
A. Yes, sir; about 10 steps, as near as I can get at it.
Q. He turned back. Did he?
A. Yes, sir.
Q. Walked toward the road. Did he?
A. Yes, sir.
Q. Right west?
A. Not exactly west; about southwest.
Q. Then, what?
A. He fired one shot when he first started.
Q. At the Indians?
A. He fired up that way; when he got into the road he fired another.

Q. At the Indians?

A. I don't know whether he fired at the Indians or not, or which way he shot

Q. Then, what?

A. By that time somebody also shot right in front of us.

Q. In an opposite direction from where the Indians were that the other man shot?

A. The Indians ran up southeast, and this was right south.

Q. That is the man that killed him; was it?

A. Yes, sir.

Q. Where did that ball go?

151 A. It went between my legs, I reckon I think it did; I found a hole in my pants the next morning.

Q. That is the first you had seen of that man; is it?

A. Yes, sir.

Q. Now, then, if I understand you, this fight was going on with the Indians between Yates and the Indians after they left there, they commenced firing and Yates went out, and he and the Indians then had their fight, and he fired towards them—fired four or five shots; the first shot you didn't see, and the four shots you saw when you went out, and during that time he advanced 30 yards or so towards the Indians, and the bullets were whistling around, and you went out to where he was, and got to him about the time that he had fired the fifth shot, or fourth shot that you saw?

A. Yes, sir.

Q. You helped him load his pistol?

A. No, sir; I never said I helped him load his pistol.

Q. He loaded his pistol out there?

A. Yes, sir.

Q. And the Indians were still firing upon him and you, were they?

A. Yes, sir.

Q. The bullets were whistling around you?

A. Yes, sir.

Q. He then retreated towards the road, which was ten steps away, fired one shot before he got to the road, and when he got to the road he fired another shot. Is that right?

A. Yes, sir.

Q. After he fired that other shot, the Indians still firing, you heard a shot from another direction, out in this direction, and that shot went between your legs, and that was from another man?

A. Yes, sir.

Q. You then left and went towards the house?

A. Yes, sir.

Q. And these two men, then, carried on the fight, fired and advanced towards each other. Is that right?

A. Yes, sir.

Q. Until Yates fell. Is that right?

A. Yes, sir.

152 Q. Did you know who that other man was?

A. No, sir; I didn't.

Q. Did that other man go up to Yates and get straddle of him and take his pistol?

Mr. FREDERICK. I object to that question. This is his own witness, and he is putting a leading question to him.

The COURT. I think you may ask it.

The DISTRICT ATTORNEY. I will ask you if you saw that man that was shooting out in this direction, after Yates fell, go up to him, get straddle of him, and take his pistol and belt from him, and his money?

A. No, sir.

Mr. FREDERICK (of counsel for defendant). We object to that, if the court please, and save the point.

The COURT. Yes, sir.

The DISTRICT ATTORNEY. I will ask you if on the next morning you did not tell a man they call Dad Depew, and Bart Salmon, and others, perhaps, who were—I don't know whether there were any others there or not—and Dad Yandell, that when the deceased left the house he started down the road; that you followed him, put your hand on his shoulder, and begged him to come back; that you walked with him down the road until he came close to where the defendant met him; that then he was fired upon, and that he was shot down and killed, perhaps firing a shot or two himself; that the first ball went between your legs; that you run, and that you finally saw the man who shot him, Marshal, this defendant, walk up to him, get astraddle of him, and rob him of his pistol and of his money?

Mr. FREDERICK (of counsel for defendant). I object to that ques-
153 tion. He asks him if he did not tell certain individuals, three or four persons, the next day there at the body, or near it, that he saw a certain transaction. I object to it in the first place, for the reason that is the Government's own witness. He is asking this question for the purpose of contradiction. That he can not do. He may prove the facts to be otherwise, as I understand the rule to be, but he has no right to call a witness and have him sworn, and then lay the foundation to contradict him, or to contradict him at all.

The COURT. There is no question about that. There is no use to discuss that. The court is very clear on that proposition. The fact that a party swear a witness, and makes him its witness, does not preclude the party from impeaching him or destroying his testimony in any way that is allowed by the law in that respect. He occupies the same position in this regard precisely as though he had never been called or sworn. It simply gives the other party the right to cross-examine him. If that wasn't the rule anybody that had a design could defeat justice. The objection will be overruled.

(Defendant excepts.)

Here court took a recess until 1.30 p. m.

154 AFTERNOON SESSION, 1:30 p. m.

Continuation of the cross-examination of George Perry, by the district attorney:

Q. I will ask you if you know Bynum Colbert?

A. Yes, sir.

Q. Was he along when you were arrested?

A. No, sir; not that I know of.

Q. I will ask you if you saw him in this town here at the time that you were here before the commissioner under arrest?

A. Yes, sir; I seen him.

Q. Did you have a talk with him about the matter?

A. Not while I was under arrest.

Q. After you were released?

A. Not here that I know of.

Q. Where did you have a talk with him?

A. I believe I had a talk with him at Waginer.

Q. When was it, do you remember?

A. It was about the 7th of August or the 8th.

Q. I will ask you if in the conversation you had with him there at Wagoner, you did not tell him that when Yates went out of the house after you had heard the shot fired, that he went out of the house, that the first shot that was fired was fired by the defendant and went between your legs, and that you then left and went a little distance off and saw the deceased fall, and saw the defendant go to him and get on his body, get astraddle of him, and take his pistol and belt and money away from him?

A. No, sir.

Q. You did not state that to either one of these men?

A. If I ever did I have no recollection of it.

155 Q. I will ask you if you were not there the next morning when these people came up there?

A. Yes, sir.

Q. What were you doing there?

A. I was setting there out from the dead body.

Q. Did you see where the pistol and belt were found?

A. Yes, sir.

Q. Did you see the man who put them there?

A. No, sir.

Q. You did not turn the pockets of the deceased inside out, did you, you and these prostitutes?

A. No, sir.

Q. Did the prostitutes while you were there with them?

A. Not that I know of.

Q. What were the names of the women?

A. Ada Bullen, and Clyde something.

Q. They were prostitutes?

A. Yes, sir.

Q. You and they went out to the body or near it and set on a log?

A. No, sir; there is no log there; we set on a rock?

Q. Do you know where the pistol was found?

A. Yes, sir.

Q. And the belt?

A. Yes, sir.

Q. Where were they found?

A. The belt was found about 15 or 20 yards west of the body.

Q. Any cartridges in it?

A. No, sir; no cartridges.

Q. Where was the pistol found?

A. The pistol was found 10 or 15 steps probably east of the body, might have been 15, or might have been 10; somewhere's about that.

Q. Hidden?

A. They were not hidden; no, sir. It was weeds there on the prairie, about a foot and a half or two feet high, and the pistol was thrown over in the weeds or laid over there.

Q. How about the belt?

A. The belt was in the weeds, too, west.

156 The COURT. Whose pistol was that?

The DISTRICT ATTORNEY. The deceased's pistol. (To the witness.) The pockets of the deceased were turned inside out, were they not?

A. Yes, sir.

Q. I want to ask you another question in connection with this question I asked you before dinner as to this conversation; you remember of seeing Mr. Salomon, both John and Bart there, on the morning after the killing before the body was moved?

A. Yes, sir.

Q. You saw Mr. Depew also?

A. Yes, sir.

Q. I will ask you if in the conversation you had with them, after you told them about the defendant jumping astraddle of the man after he killed him, and took his pistol and money, if you did not say to them that when they caught this defendant Marshall, as you called him then, that they would find the $20.00 gold piece on him?

A. I don't think I said that; if I ever said it I do not have any recollection of it at all.

Q. You admit they were all there, do you?

A. Yes, sir; they were all there.

Q. How many of these Indians were there who came to that house that night?

A. There were three of them.

Q. Who were they?

A. I don't know any of them but Jim Walker; I didn't know him at that time.

Q. Jim is here, is he not?

A. Yes, sir.

Q. Were they horseback or on foot?

A. Horseback.

Q. How long after they left was it before they commenced shooting?

A. They had just had time to reach out about 100 yards from the house.

Q. I will ask you if you did not hear a shot before Yates went out of the house coming from the other direction?

157 A. I did not.

Q. Was the hous' shot any?

A. There was one shot in the house a good while after the shooting commenced, after I was out of doors.

Q. Only one hole shot in it?

A. Yes, sir.

Q. I thought you said that Yates put a hole through the roof.

A. No, sir; I said that he shot a hole through the floor.
Q. That is the one you speak of?
A. No, sir.
Q. You mean there was a shot came into it by the party's pistol?
A. Yes, sir.
Q. Only one?
A. Yes, sir; that is all.
Q. I believe you say now that the first ball, the first shot that was fired from the man in the other direction from where the Indians were firing, went between your legs? The first shot that was fired from the opposite direction from where the Indians were firing, from the man in the opposite direction, went between your legs?
A. Yes, sir; right south of us; right down the road, fired a shot that went through my legs.
Q. He was south of you, was he?
A. Yes, sir; right due south of us.
Q. When Yates discovered there was another man shooting at him in an opposite direction from the Indians, what did he do?
A. He was shooting all the time.
Q. But what did he do when he found that man was shooting at him?
A. He went down the road, right towards him, shooting.
Q. He was shot at just as soon as he got into the road, I understand you to say; he retreated from the Indians ten steps west into the road, and when he got into the road he fired a shot you claim you didn't see, and the man south of him fired a shot at him?
158 A. No; the shot I said I didn't see was before I came out of the house when he first went out of the house.
Q. You said after he loaded his pistol he fired a shot and then he retreated to the road and there he fired a shot, and that you could not see the direction in which he was shooting?
A. I said he fired a shot when he first started about 10 steps from the road; when he loaded his pistol he fired a shot, and when he got into the road he fired another shot. He fired the first shot towards the Indians, and the next shot right down the road south.
Q. You have said that shot you didn't see which direction he did fire?
A. I don't think I did.
Q. Well, we will have the stenographer write out your testimony on that point. You did not state that to me in the cross-examination here just before dinner?
A. I don't think I did. There was one shot I don't know which way he shot when he first went out of the house.
Q. I didn't ask you anything about that myself. That is the way I have got it down. Did the Indians fire any more?
A. The Indians were there; I don't think there was more than two shots fired when the Indians quit shooting.
Q. The Indians were shooting at him the other way, and this man on the south was shooting at him the other way?
A. Yes, sir.
Q. He was between two fires when he was killed?
A. When he fell the Indians were not shooting at all. There was a bunch of trees between him and the Indians when he fell.

Q. When he fell the Indians 'ere not shooting at all?

A. No, sir.

Q. He was between, or very nearly between the two, the Indians and the man south of him, when he was shot?

159 A. The man was south of him and the Indians were east of him.

Q. Was one east and the other south?

A. The Indians were a little southeast.

Q. Then you were not right when you said the one was south and the others east?

A. It was a little southeast.

Q. The shots were coming pretty near from the same direction towards him, were they?

A. It was like the Indians were over in that corner and the man was over here.

Q. The Indians were firing from here (indicating), and the man from here (indicating)?

A. Yes, sir.

Q. One from the east and the other from the southeast?

A. Yes, sir; on one from the south and one from the southeast.

Q. You think that the man you saw was shooting from the south and the Indians from the southeast?

A. Yes, sir, that is the way I think it was.

Q. The Indians kept on firing up to the last two shots. Who fired the the last 2 shots?

A. I won't be certain how many shots there was fired, but I will not state there was over two shots after the Indians quit shooting. There wasn't more than two shots fired after the Indians quit, and maybe one.

Q. Who fired that?

A. I think this man from the south fired one and Yates fired one.

Q. Then there must have been two?

A. Yes, sir; that is what I think about it. The shooting was pretty near altogether. I was excited as well as anybody else, and I could not tell exactly how it was. It was pretty close; there was not a minute between times until the whole shooting was over.

Q. There were three Indians?

A. Yes, sir.

160 How many shots did they fire during the fight?

A. I don't know; I think they must have fired somewheres about 18 shots. That is what I would think they fired; somewheres near that.

Q. The deceased was shot in his right shoulder, was he not?

A. Yes, sir.

Q. Up into his neck?

A. Yes, sir.

Q. You say that ball did not go through his neck?

A. I do not think it did.

Q. Did you examine it to see?

A. No, sir; I didn't examine it; I only saw two holes in him. I looked at him; I saw him when they dressed him, and I helped carry him in the house.

Q. You did not examine the wounds closely?

A. No, sir; I didn't examine the wounds closely at all.

Q. You say that the ball did not strike here at the top of the shoulder and go in here and come out here?

A. No, sir.

Q. On the left side?

A. No, sir; there was no hole there, or if there was I could not see it.

Q. Did you know the defendant was armed with a knife when he came there?

A. No, sir; I did not.

Q. Did Yates or Micky Free tell you that he was?

A. No, sir.

Q. What direction did Yates go when he left the house, to where these Indians were shooting at him?

A. He left the house a little southeast; just a little southeast.

Q. A little east of south?

A. More south; just a little southeast.

Q. How many shots had the Indians fired before he got out of the door?

A. I don't know; I think they had fired between two and three shots.

161 Q. Did you hear the balls?

A. No, sir; I did not.

Q. You did not hear any balls when he stepped out?

A. No, sir.

Q. They had fired two or three shots before he stepped out of the door?

A. Two or three; I don't know how many.

Q. When he stepped out of the door he fired and squatted?

A. He was just getting up when I got there the first time he shot.

Q. Then he started right towards them, did he?

A. Yes, sir; he started right towards the Indians.

Q. And advanced upon them and fired at them, and they fired at him?

A. Yes, sir.

Q. Then he stopped and loaded his pistol after he had got about 30 yards from the house?

A. Yes, sir; after he had shot it he stopped and loaded his pistol.

Q. In what direction does Lulu live?

A. Right due south.

Q. In the direction from which this defendant came when he was shot?

A. Yes, sir.

Q. South McAlester was due south, too, was it not?

A. No, sir; South McAlester was a little southwest.

H. How far was Lulu's house from where you first saw the defendant when he was shooting, when he fired the first shot?

A. I suppose he was about 15 or 20 steps from the house.

Q. From her house?

A. Yes, sir.

Q. Her residence?

A. Yes, sir.

Q. You say that is not in the direction of South McAlester; how much out of your way would you have to go in going up to the place where you kept the saloon from South McAlester and go around by Lulu's?

A. It is right on the road.

162 Q. I asked you if it was on the road, and you said "no"?

A. You asked me if it was south; it is a little southwest.

Q. The road runs around there?

A. Yes, sir; it runs around right by the house.

Q. It is right on the road to South McAlester?

A. Yes, sir.

Q. You would have to go by her house to go to South McAlester wouldn't you?

A. Yes, sir; if you go the road you would.

Q. How far apart were the two houses?

A. I guess they are about 130 yards, I reckon, maybe a little more; I never stepped them.

Q. These Indians then were to the left of her house when they were firing were they?

A. Yes, sir; to the left of the house from where I was.

Q. What direction did the deceased go after he loaded his pistol?

A. Started towards the road; he went west until he struck the road and a little southwest.

Q. He went west?

A. Yes, sir; a little southwest.

Q. He was going the direction of where the defendant was then?

A. The defendant was coming from the south, and he was going southwest.

Q. Then he was going a little from the defendant?

A. He was going towards him.

Q. The defendant was coming from the south and he was coming towards the southwest?

A. Yes, sir.

Q. He was ten steps from the road going southwest?

A. Yes, sir; he was going southwest to the road, and the defendant was coming up right from the south.

Q. Did you know the defendant was there until he shot?

A. I saw the bulk of a man coming up the road; I did not

163 know who it was, him or whether it was somebody else.

Q. Did he say anything?

A. No, sir; never spoke a word.

Q. How was he coming, walking or running?

A. He was just walking along up the road. I thought maybe it was Micky Free or some body, some of them, I didn't know who it was.

Q. Did he say anything?

A. No, sir.

Q. How close were they together when the last shot was fired?

A. I would think they were about 2 or 3 steps apart from where I was; I was right on a line with them and down hill too; I could not tell exactly. I would take them to be about 2 or 3 steps apart.

Q. They both kept advancing and shooting, did they?

A. Yes, sir.

Q. Did either one of them say anything while they were shooting.

A. I never heard them say anything at all after the shooting commenced.

Q. Did they speak to each other at any time after that shooting commenced?

A. No; not that I know of; I never heard them if they did.

Q. Did you see anything more of the Indians?

A. No, sir.

Q. When Yates fell there was no more firing after that?

A. No, sir; I never saw anything more of the Indians until I saw them here at Fort Smith.

Q. There was no firing after Yates fell was there?

A. No, sir.

Q. Now then, you went off; you went to Bill Smith's; how far is that from there?

A. About half a mile I guess.

Q. He is dead, is he not?

A. Yes, sir.

Q. He was a witness on the trial against you?

A. Yes, sir.

Q. How far do you say it was to Bill Smith's?

A. It was about half a mile I would take it to be.

164 Q. What direction?

A. It is a little northwest.

Q. What did you go there for?

A. I went there to try to get him to come up there to put this man in the house.

Q. What did the defendant come there for, do you know?

A. He said he was going to take the train to go to Muskogee.

Q. So you were with Yates when this shooting was going on, and you left Yates dead up there, and you and the defendant were down to Bill Smith's immediately after, both 'gether?

A. I went to Bill Smith's by myself.

Q. You both got there in a short time after the shooting occurred?

A. He came there in a few minutes after I got there.

Q. You and he were both half a mile from where the dead man was, and both together immediately after the shooting?

A. We were both together down at Bill Smith's.

Q. Do you know whether the defendant took the train or not?

A. No, sir; he said he was going to; that is all I know about it. I don't know whether he did or not.

Q. You gave him a dollar to get away with?

A. Yes, sir; I gave him a dollar.

Q. Did you see the pistols that he had?

A. Yes, sir.

Q. Do you know whose they were?

A. I never had them in my hand; I saw pistol buckled on him.

Q. How many did he have?

A. He had two.

Q. Had two pistols buckled on him?

A. Yes, sir.

Q. Did he have any pistols when he was there in the first part of the evening before the shooting?

A. I never saw any.

Q. But he had two when you saw him at Bill Smith's, did he?

A. Yes, sir.

165 Q. Did he have any cartridges?

A. I don't know whether he did or not.

Q. Did he have a belt on it with any cartridges in it?

A. He had a belt on; I don't know whether there was any cartridges in it or not; I never noticed.

Q. One pistol on each side?

A. Yes, sir.

Q. One left handed and the other right handed?

A. I don't know that either; I don't know whether it was a left-handed scabbard or a right-hand scabbard.

Q. Did he have his knife when he was down there?

A. I never saw any knife.

Q. The only time you saw a knife was when he picked it up of' of the ground?

A. Yes, sir.

Q. Did he leave there when you did?

A. He left there before I did.

Q. Going up to north McAlister?

A. Yes, sir.

Q. That is old McAlester?

A. Yes, sir.

Q. To take a train?

A. Yes, sir.

Q. Did you ever see him about there since then? Did you ever see him again until you saw him here?

A. I saw him over here in the jail.

Q. You never saw him again until you saw him over here at the jail, in Ft. Smith?

A. No, sir.

Q. Did you know where he was going?

A. No, sir.

Q. You didn't know he was going to Mississippi?

A. No, sir.

Q. I will ask you when he came up there if he didn't have his six-shooter in his hands instead of his belt?

A. Yes, sir; he had one in each hand.

Q. Didn't he throw the two pistols down on you and Bill Smith?

166 A. Yes, sir; he did.

Q. I will ask you if when Yates called him a son of a bitch if he did not tell him that he would kill him?

A. I never heard him if he did.

Q. I will ask you if you did not hear him tell Bill Smith in your presence when he came down there with these two pistols in his hand, he said to you, turned to you and said, "George, you heard Yates call me a son of a bitch, and I told him I would kill him, and I have done that." Didn't you hear him make that statement there to Bill Smith in your presence—to you in Bill Smith's presence? Now think about that.

A. I don't know whether he said it or not.

Q. You were there; you ought to know. I will ask you again, and I want the truth, now, and you must tell it.

A. I am going to tell that.

Q. When you were down here at Bill Smith's he came up with these two pistols in his hands, and there threw them down on you, after he came up and found out who you were, I will ask you if he did not want to know who you were, and Smith told him who you were, and then he stepped up to you, spoke to you, said: "George, you heard Yates call me a son of a bitch, and I told him I would kill him, and I have done it. You will find him laying in the road up there. If he is not dead it is no fault on my part."

A. I don't recollect that.

Q. Did you hear any such language as that coming from him?

A. I don't recollect of hearing him say that.

Q. What did he say?

A. He come up, he had a pistol in each hand, and I was standing on the left of the road and Bill Smith here on the right, on the west
167 side, and I was standing on the east side, and he had a pistol in each hand, and he threw down on us and said, "Who is this?" And I said, "It is George; what is the matter, Bob?" He says, "Nothing; that is all right. Who is this over here?" and I said "Bill Smith," and he said, "I am shot; come and go down here and cut this ball out of my arm," and we walked down to the house and cut the ball out of his arm.

Q. Is that all he said?

A. He said, "I had a shooting scrape up here. Jim Yates shot me up here, and I had to kill him."

Q. You deny this statement, then? You swear before Almighty God you didn't hear that statement made?

A. No, sir; I never said that he said it.

Q. I haven't said yet you did say he said it.

A. If he said it I never heard it. That is all there is to it.

Q. I will ask you if you didn't also tell Bill Smith that during that fight that Marshal drew a knife on Yates?

A. I told him that Yates said he dropped his card, and Yates told him to go down after it, and I told him I guessed he had gone down after a knife or something; that Yates drew his pistol; that he didn't have time to use the knife if he had it, and he grabbed the pistol and they had a scuffle over it.

Q. Why did you tell him that you guessed that Marshal went after the knife if you didn't know that he had it there?

A. I just supposed that he did. I didn't know. I did not know whether he did or not.

Q. What is it what made you think so?

A. Because I saw they were robbing him. I saw that he was mad, and that Yates was mad, too, and Micky Free also.

Q. You saw they were all mad?

A. Yes, sir.

168 Q. You told me a minute ago he was laughing when I asked you what his manner was—that he was laughing.

A. He was laughing all the time; he was laughing the last time I saw him.

Q. But mad, was he?

A. Yes, sir.

Q. Why did you tell him that you guessed he went for his knife, when you didn't know that he had a knife there; that is what I want to know?

A. Like I would see anybody else going down after anything, I would think they were going after something.

Q. That is the place men carry knives down here, is it not?

A. Men carry knives in a heap of places.

Q. You told Bill Smith that you guessed that Marshal went for his knife. I would like for you to give me some reason other than you have given why you guessed that he went for his knife.

A. Because he was mad, and Jim Yates had told him that he was going to kill him before breakfast next morning; had threatened to kill him, and they were robbing him, and I was looking for trouble to come up all the time; I supposed that he was fixing for him; I didn't know; I don't know why I thought so.

Q. I will ask you if you didn't tell Bill Smith that when you got back to the house after going out with Yates that you looked around and saw a man what you thought was Marshal in the brush shooting rapidly?

A. No, sir; I did not.

Q. You say that at one time in the house there that the defendant had Yates's pistol?

A. Yes, sir.

Q. What time was that that he got the deceased's pistol?

A. It must have been somewheres about 10 or 11 o'clock.

Q. At night?

A. Yes, sir.

Q. What did he take his pistol for?

169 A. He stepped out of the door, and as he came back Jim Yates was setting next to the door, and had his pistol on, and he just lifted it out of the scabbard, and walked around and sat down. Jim Yates got up and said, "Give me my pistol, Bob," and he said, "Shucks, go on down there and play your hand," and Yates said, "No, I won't do it; that is something I don't like anybody to do, to take my pistol," and he said, "Give it here," and Bob said, "All right; take it."

Q. They were playing cards, were they?

A. Yes, sir.

Q. How long after Yates knocked Bob down was it until he came back again and this firing commenced?

Q. He come back it must have been about two hours; I think it was about that.

Q. Did you find anything else about there except what you have named; the belt, and the pistol, and forty or sixty cents in money, and the knife?

A. I don't know how much money it was that I found.

Q. You have said it was forty or sixty cents?

A. It was somewhere along there.

Q. But I am not asking you how much money you found; that is not the question. Besides this money and these other things, did you find anything else at that time?

A. No, sir.

Q. When these officers came in the morning they were there when the belt and pistol were found, were they not?

A. Dad Depew was there; I think he was about the only officer there was there at that time. I won't be certain, but I think he was.

Q. How long were you gone before you came back when you went down to Smith's?

A. I guess I was there 20 or 25 minutes before Hall came, and we stood there I guess about 20 minutes, and he went off and went to
170 Southtown, and I walked back; it is a mile to Southtown from Smith's, and then half a mile back up there.

Q. How long were you gone?

A. I don't know, sir; it was something over an hour.

Q. You got back to the body about daylight?

A. Yes, sir.

Q. You were gone about an hour?

A. Yes, sir; I guess it was over an hour.

Q. I will put it down an hour or more then?

A. Yes, sir.

Q. Did anybody go back with you when you came back to the body?

A. No, sir.

Q. It was at that time that you got the two women and went out and set on a rock there?

A. Yes, sir

Q. What did you do that for?

A. I didn't want the hogs to tear him up.

Q. Had the hogs been interfering with him?

A. No, sir; not that I know of, but there is a great deal of hogs around there on the prairie there.

Q. Had the women been watching, do you know?

A. I don't know whether they had or not; they said they had not.

Q. You were how far from him when you set on the rock?

A. About 30 or 40 steps.

Q. You went up in 5 or 6 feet of them, and then took your place on the rock?

A. That is when I came back from Southtown I passed on one side of the road and he was laying on the other.

Q. That is when you came back?

A. Yes, sir.

Q. Then as far as you know you were the first man to the body?

A. As far as I know; yes, sir.

Q. When you came back and took these two women out there to keep the hogs off I suppose you staid there until morning?

A. I sent this Luly May's *m*down to South town, and she came
171 back, and I sent a man, I forget his name, down to Southtown to get some men.

Q. You remained there outside there by the body?

A. Yes, sir.

Q. Did anybody come up there and rob the body while you were there?

A. I never seen anybody do it.

Q. Did anybody turn the pockets inside out while you were there?

A. I never seen anybody come there while I was there.
Q. Did these women do it while you were there?
A. I guess not; I never seen them.
Q. Did you do it?
A. I did not.
Q. You know they were turned inside out?
A. They were when I got to him after daylight.
Q. You got to him before daylight?
A. I did not go to him until after daylight, until Dad Depew got there. I went and woke these women up, and we went up there after they were dressed.
Q. There was no opportunity after that for anybody else to do it, was there?
A. No, sir; after we came back up there there wasn't an opportunity.

Re-direct examination.

By Mr. FREDERICK. The district attorney asked you if you told Depew, and Yandell, and Salmon, and two or three others, that you saw the defendant, Marshal Hall, get astradd*el* of the body after he shot him and rob him, take his pistol and money, and you said you did not tell them that?
A. No, sir; I did not tell them that.
Q. Did you see anything of that kind?
A. No, sir.
Q. Did you see him go to the body after he fell?
A. No, sir.
Q. After Yates fell what did Hall do?
172 A. They were close together when Yates fell, and Hall, or whoever he might be, walked off west towards Ada's house, and went in the house; that is the last I saw of him until I met him in the road.
Q. Which way was Ada's house from where the body lay?
A. Right due west.
Q. Was it due west?
A. Yes, sir; I guess it was. I don't guess it would miss it a foot and a half of being due west.
Q. He went over there?
A. Yes, sir; he went in the house.
Q. The district attorney asked you with regard to what you told Smith, what Smith says that you said, and then he asked you *that* it was that Hall did theere. Now, what was it that h' did there at Smith's in the presence of Bill Smith?
A. If you will give me time I will tell you everything that he said that I can recollect of, and what he did. He said to me, "Jim Yates is up there, and he commenced shooting at me, and he shot me in the arm, and," he says, "I had to kill him; and," he says, "come and go down here and cut this ball out of my arm." We went down there and cut the ball out of his arm and dressed it, and I gave him a dollar, and Bill gave him some bread and a vest; I don't know whether Bill gave him any money; I think he did; and he said when he started off, "George, I wish you would look out for my book." He says, "I have lost it somewhere or another, and," he said, "if you get it, you send it to D. G. Hall, Yazoo City, Mississippi."

Q. Did he tell you anything else about the killing than what you have already told?

A. He said that Jim Yates commenced shooting at him, and shot him in the arm; shot him first, before he ever fired a shot.

Q. You think, or you state, that Yates first went out in a
173 southeast direction towards these Indians, shot out in that way, and then in a southwest direction back to where—to that road?

A. There is a road running right due north and south from one house to the other, and he went out to the left of this road—east, I guess, about 30 or 35 yards.

Q. You said that he went out southeast, and there he loaded his pistol; and then you say that he turned in a southwest direction?

A. Yes, sir.

Q. Where did he go before he fired, then?

A. He went back right southwest to the road, where there is a lot of rock there.

Q. When was it that he fired in the direction of where Hall was?

The first shot as soon as he loaded his pistol and started, and I do not know whether he made two or three or one step, and he fired his pistol off; and the next time he got right in the edge of the road—about the road there, somewhere—and he fired another shot right due south down the road.

Q. At that time you saw the other party down towards the house?

A. I saw the bulk of a man.

Q. Did he fire in the direction of that man?

A. He fired right south.

Q. How far was he from that man then?

A. I don't know.

Q. How far, about?

A. I would think about 60 or 70 yards, maybe a little more; somewher' along there. I think it was 60 yards, anyhow.

Q. How far down that way did he go before he fired towards that house?

A. He went between 35 and 40 yards.

Q. While he was going down that 25 or 30 or 40 yards what was he doing; was he shooting his pistol on the way then?

A. Yes, sir; he was shooting it all the way.

174 The DISTRICT ATTORNEY. I submit to the court that the gentleman has gone over all this in his examination-in-chief.

The COURT. Yes, sir.

Mr. FREDERICK (of counsel for defense). What was the other man doing down there whom you supposed to be Hall; what was he doing down there at the time that Yates was down there firing?

A. He was firing too.

Q. Where was Yates at the time that Hall fired his first shot? You say that he had gone down southwest——

A. Yates was just about this rock, and I was right by the side of him; hay my hand on his shoulder.

Q. He was about there when Hall had fired his first shot?

A. Yes, sir; whoever he was.

Q. You say the Indians were firing at the same time?

A. Yes, sir; it looked to me like there was 50 or 60 men shooting; I was scared.

Q. Where were these Indians with regard to these other two houses?

A. Out southeast.

Q. How many houses on that Chippy Hill?

A. Six houses; three two deep—two north and south and three deep east and west.

Q. These Indians were down here between these two houses [indicating on map]?

A. Yes, sir.

Q. How far is it from where these Indians were to where Yates was; could you tell at the time the shooting commenced with Hall?

A. It must have been 100 yards, or a little over; somewheres about 100 yards.

Q. There were three of them?

A. Yes, sir.

Q. How far is it from where Yates fell where Hall was when
175 you saw him walk away and go to Ada's house?

A. Here comes some trees here, and here is some rock. The rock is north of the trees.

Q. How far are the trees from Lou's house; are they nearer the house of Lou then the beer house?

A. Yes, sir; Hall was coming up from this house; that is the south house; me and Yates were right out here; that is about east of the road, in a southwest direction of where these rocks were; right there is where Yates fired down the road.

Q. What I want to know is, how far from where Hall left to go over to Ada's house, how far it was over to Ada's house?

A. These houses set about the same distance apart; it is about 100 yards; Yates was about 30 yards north of these trees, and Hall was about 35 or 25 yards south of these trees when the shooting commenced.

Q. How far was it from these trees where Yates fell?

A. He fell right south of the trees seven or eight steps.

Q. Who was in this house up here north of where Ada was?

A. No one in there; she had some furniture in there, but no one staid there.

Q. Which way did Smith live from the beer house?

A. It is about half a mile in a northwesterly direction.

Q. Did you know Jim Yates's pistol?

A. Yes, sir.

Q. Would you know it now again if you would see it?

A. Yes, sir; I think I would.

Q. What pistol is the pistol I now hand you?

A. That is not Jim Yates's pistol.

Q. Do you know what pistol James Yates had that night?

A. He had his pistol, the one he had been carrying all the time.

Q. How do you know that this is not his pistol?

176 A. He cut his pistol all to *peices* beating the glass out of Ada Bullard's house.

Q. What effect did it have on the pistol?

A. It left cuts on it. This is not his pistol, because I know his pistol was cut al' to *peices*. I carried it myself last spring.

Recross-examination by the DISTRICT ATTORNEY:

Q. You say this is not Jim Yates's pistol?
A. No, sir; it is not.
Q. What co'or of handle did his pistol have?
A. Kind of white handle.
Q. Was it loose like this is?
A. No, sir; if it was loose I never saw it loose. It wasn't right white; it was a kind of cream-colored handle.
Q. A handle not loose like this?
A. No, sir; not that way.
Q. Was it James Yates's pistol that was found there that morning?
A. No, sir.
Q. Whose pistol was it?
A. I don't know.
Q. Is this pistol that has been shown to you the pistol that was found there that morning?
A. I don't know whether that is or not.
Q. Was it a pistol like this?
A. It wasn't a white handle pistol like that; it was about that size.
Q. It wasn't white-handled?
A. No, sir; it was a kind of cream color.
Q. The one that was found?
A. Jim Yates's pistol.
Q. The pistol that was found that morning?
177 A. The pistol that was found, I think, was a white-handled pistol.
Q. Is this the pistol that was found?
A. I do not know.
Q. Was the pistol loaded that was found?
A. Yes, sir; it had five loads in it, as well as I recollect.
Q. You swear that this is not Jim Yates's pistol?
A. I know it is not.
Q. Of course you would not swear to it unless you knew it, would you?
A. No, sir.
Q. You saw him go into Ada's house, did you, the defendant, after the shooting?
A. I saw him go to the door, and the door opened; I suppose he went in there.
Q. Ada was at home at that time?
A. Yes, sir.
Q. She is here?
A. Yes, sir.
Q. She is a prostitute, is she not?
A. She was at that time; I don't know what she is now.
Q. You have not tried her since?
A. No, sir.

178 Mrs. IDA BULLARD, having been duly sworn upon behalf of the defense, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Question. What is your name?
Answer. Mrs. Ada Bullard.

Q. Did you know James Yates in his lifetime?

A. Yes, sir.

Q. Do you know when was he killed?

A. Yes, sir.

Q. How long before Yates was killed did you see him?

A. I think about 1 o'clock; I am not positive, though; at night before he was killed.

Q. One o'clock at night, when he was killed that night?

A. Yes, sir.

Q. Where did you see him?

A. He came to my door hunting Mr. Marshal.

Q. Who came with him? Tell us about it.

A. There was a gentleman with him, but I could not swear who it was; I think it was a gentleman by the name of Free.

Q. How did he come; tell us the way he did, and all about it?

A. He came to the door and knocked.

Q. What did he say?

A. I don't know what he said. I asked him what he wanted, and he said he wanted in, and I said, "No, I am in bed; I can't let you in." He said, "Open the door or I will kick it in." I said, "No, don't kick my door in; I will open the door."

Q. Use his language as well as you remember.

A. He said, "Is Marshal Hall here?" I said, "No, he is not
179 here." He said, "You are a damned liar." I said, "No, Jim, I *am* no liar." I said, "Marshal isn't here, and he has not been here since this evening." That was before I opened the door; and when I opened the door he came in with his gun in his hand——

Q. Gun or pistol; which do you mean?

A. His pistol. And the other gentlemen stood on the ground. There were three steps to the door to get into the door, and Yates threw the gun right up in my face, and he said, "I want to see if Marshal Hall isn't here." And I said, "No, he is not here; don't you see?" And he just stepped in the door and looked around, and went out and said, "No, the son of a bitch ain't here," to the other man that was with him.

Q. What did he say about it?

A. I don't know; he went away.

Q. Did he say anything more?

A. No, sir; he went away, and I went to sleep.

Q. Did you see Hall after that?

A. No, sir; not till about 3:00 o'clock; I don't know what time it was; it was in the night; I could not tell the hour, because I had been asleep, and I never noticed.

Q. You did see him; where did you see him?

A. He came to the door.

Q. What door?

A. To my door, and asked me to get up; he said, "Ada, get up; I am wounded." And when he said he was wounded (I told him to go away when he first came, that I was asleep), and when he said he was wounded, and I thought of his being hurt, of course I got right up and went to the door, and he was holding his arm sorter, and he said, "I am

wounded in the arm;" and that excited me so bad I don't know what I did say or do. He came in and asked me to cut the ball out of his arm.

180 Q. Did you see any wounds?

A. Yes, sir; I saw the hole; there was a hole in his arm.

Q. Did you see any blood?

A. Yes, sir; there was blood on his shirt, but I could not tell you whether there was much or little, because blood scares me pretty near to death. When I saw the blood I just lost all control of myself, and didn't know anything else. I can't hardly tell what I did do, only he tried to get me to cut the ball out of his arm, and I could not do it; I didn't have the nerve to do it.

Q. How long did he stay there?

A. He didn't stay but a few minutes. He said: "Well, if I can't get you to cut the ball out of my arm let me have money to get it cut out." And I gave him a dollar and a half.

Q. You don't know where he went to?

A. No, sir; I don't know; he went out.

Q. Did you see him any more after that?

A. About the dollar and a half, I owed him a dollar and a half; he had loaned it to me in the evening. I had asked him for it in the evening and he loaned it to me during that same evening, and then I let him have it back because I had it in the house then.

Q. Did you see him any more after that?

A. No, sir; I never saw him any more.

Q. Did you see Yates after that?

A. No, sir.

Q. Did you see Yates's body?

A. I don't know whether I went to sleep or whether I was lying there just in a state of excitement, but there was a young lady with me; after this Marshal Hall left, she woke me up, or touched my arm; I don't know whether I was asleep or not, or just excited so, but she said, "Get up, quick, there is somebody at the door," or "at the window,"

181 and she said, "I never was so excited in my life." There was some one pulling the curtain.

The DISTRICT ATTORNEY. What was the woman's name?

A. Miss Clyde Burke.

Mr. FREDERICK (of counsel for defendant). Go on and tell what you saw.

A. We were sleeping together in the bed, and she said: "There is somebody pulling the curtain," and I said: "I don't know whether I can go out. I am afraid to go out;" and she says, "Wel', we will see if any one comes to the door." I wasn't bothered any more until about 4:00 o'clock, I guess.

Q. Did you hear or see any one then?

A. I heard somebody afterwards up towards Yates was shot, but I didn't see them.

Q. You do not know who it was?

A. No, sir; I didn't see anybody at all.

Q. How long was that after Hall was left?

A. I guess it was about half an hour, maybe not so long.

Q. You didn't get up or go out?

A. No, sir; I was afraid even to pull the blind.

Q. Did you see Yates's body after that?

A. Yes, sir; I saw it the next morning; it was just when it was getting daylight. I do not know what hour it was. It was just getting daylight.

Q. Who was with you whon you saw it?

A. George Perry came to my house after Marshal left, I guess about 4:00 o'clock, and he told me to get up. He said: "Jim Yates is killed;" and I got up, but I don't know, I can't hardly tell what I did, only he asked me if I wouldn't go up help him mind the hogs off of the body, and I said "No; I never could go up there if there was a corpse." I was excited so bad I could not go up, and he said: "You can go
182 far enough that you can see that the hogs don't eat him," because, he says, "I am too much excited to stay there by myself." I went up there so that I could see around, but I could not distinguish—I could not see the body then at all, but when it got daylight, after the people from South McAlester came up, I went with the rest of them up to where he was shot.

Q. You think it was about 1:00 o'clock when Yates came there?

A. I should judge it was; I don't know, because I had been asleep and he woke me up out of my sleep; I was tired when I went to bed.

Cross-examination:

By the DISTRICT ATTORNEY. What time in the evening was it that the defendant came to your house?

A. He came there just after sundown, between sundown and dark.

Q. What was his business?

A. He was just walking around, I suppose; he came up there and went from there on away; he wasn't there more than, I guess, half an hour.

Q. He loaned you the money?

A. I asked him for it; I needed it.

Q. You must have been pretty well acquainted with him?

A. I was acquainted with him.

Q. He came to your house about sundown and was just walking around?

A. Between sundown and dark.

Q. Did he do anything else besides walk around?

A. I never seen him do anything else.

Q. What were you doing up on Chippy Hill?

A. I was living there. That was my place of residence at that time.

183 Q. Why were you living up there?

A. I was the first person that ever lived on the hill.

Q. On Chippy Hill?

A. Yes, sir.

Q. Who gave it its name, you?

A. I don't know; I didn't.

Q. What was your business there?

A. I was living there; that was my place of residence.

Q. Lulu was living there too?

A. Yes, sir.

Q. We all know what her business was; what was yours? The same?
A. Yes, sir.
Q. You were running a house of prostitution?
A. I suppose so.
Q. What was this young lady that was with you, Miss Clyde Burke? She was a prostitute too, was she not?
A. Yes, sir.
Q. Did you have any other girls there except Clyde and yourself?
A. No, sir.
Q. Then the defendant was up there to see the girls?
A. He never came in the house.
Q. He loaned you the money outside?
A. We were all out in the yard; it was a warm evening.
Q. Which one did he come to see generally, you or Clyde?
A. He never made any business known; he was just up there.
Q. You got well acquainted with him?
A. I was acquainted with him; he had a place of business in South McAlester.
Q. Lulu kept a house of prostitution, did she not?
A. I do not know much about Lulu myself.
Q. You and she were not very good friends?
A. We were always good friends.
Q. You are not keeper of a house of prostitution now, are you?
A. No, sir.
Q. You have reformed?
A. Yes, sir.
184 Q. Is Miss Burke's name Cly or Clyde?
A. Clyde Burke. She is married now and living in Tennessee.
Q. She has reformed, too, has she?
A. Yes, sir.
Q. Has Lulu reformed?
A. I am sure I don't know.
Q. How long had you been running that house of prostitution?
A. I went there about two years ago the third of this month.
Q. When did you leave there?
A. Last October.
Q. That is when you married?
A. Yes, sir.
Q. A man came up there and married you out of that house of prostitution?
A. Yes, sir.
Q. Did he know you were a prostitute?
A. Yes, sir.
Q. You would not let a man marry you without him knowing that you were a prostitute?
A. No, sir; I kept nothing secret.
Q. He took you as you are, good Lord. What was George Perry doing?
A. I don't know.
Q. He was running a saloon there for Lulu, was he not?
A. I believe he was; I could not swear that he was, because I left that part of the hill alone; it wasn't anything to me.

Q. You run your own establishment?
A. I run my own private house. That is all I tried to do.
Q. You tried to run a more decent house than Lulu?
A. I had no beer, and I had no business with her.
Q. You didn't run a little beer hell with your establishment?
A. No, sir.
Q. You tried to keep a decent place?
A. Yes, sir.
Q. You say when he came there you borrowed a dollar and a half from him; how much money did he have?
A. I don't know. A dollar and a half is all I asked him for.
Q. That wasn't to pay for anything?
185 A. No, sir; I borrowed it with the intention of paying it the next day.
Q. You charge men when they came there, didn't you?
A. I do not suppose he came there for anything wrong; he made no business known.
Q. When men came there on business you charged them?
A. I suppose so.
Q. You know that, of course?
A. Yes, sir.
Q. You could not run a house of that kind on nothing; you had to live and clothe yourself; that is the way you got it, is it not?
A. Yes, sir.
Q. This dollar and a half wasn't to pay you for any business?
A. No, sir.
Q. He wasn't up to your house that evening on business?
A. If he was he didn't make it known.
Q. Then, you say, that about 1:00 o'clock Mr. Yates came to your house?
A. It was sometime in the night; I suppose about 1:00 o'clock; I could not say; I had been asleep and could not tell.
Q. He wanted to find the defendant?
A. Yes, sir.
Q. He asked you if Marshal Hall was there?
A. Yes, sir.
Q. And you told him "no"?
A. Yes, sir.
Q. Did he kick the door in?
A. No, sir; he said he would if I didn't open it.
Q. You opened it and he came in with his pistol in his hand, and said again, "Is Marshal Hall here"?
A. He didn't come plumb in the house; just came to the door.
Q. Don't you know that the defendant did not go by the name of Marshall Hall at that time, but that it was Marshal?
A. I call him Marshal Hall because I thought you would un-
186 derstand better. He called him Bob Marshal.
Q. He didn't say "Is Marshall Hall here?"
A. No, sir; he said "Marshal."
Q. Is Marshal here?
A. Yes, sir.

Q. Then you were mistaken in your examination-in-chief and your cross-examination when you said that he used the language "Is Marshall Hall here?"

A. He said "Marshal."

Q. He said "Is Marshal here?"

A. Yes, sir.

Q. You correct that?

A. Yes, sir; when I said "Marshal," it was because I was calling his name Marshall Hall, now, myself.

Q. You think you are not saying anything else that you do not know. You told him that he was not there, and he turned around and said "The son of a bitch is not here," speaking to whom was with him.

A. Yes, sir.

Q. I suppose you heard the shooting?

A. No, sir; I didn't hear any shooting.

Q. You didn't have a man with you?

A. No, sir.

Q. Had you been up late the night before?

A. I could not say: I don't know; I don't remember.

Q. You didn't hear any of the shooting?

A. I never heard a shot.

Q. I suppose it was a very frequent up there to hear shooting?

A. Yes, sir; shooting is of very frequent occurrence.

Q. There had been a man killed up there before?

A. I never knew it if there was.

Q. There had a man arrested for shooting him when I was up there—that is when I was at South McAlester, not Chippy Hill?

A. If there was I never heard of it.

Q. Don't you remember when the woman was arrested?

187 A. I think that was afterwards.

Q. How old was Clyde?

A. She was younger than me.

Q. What is your age?

A. 25.

Q. How long had you been in that business?

A. Two years. 2 years the third of this month I occupied my first house of ill-fame that I ever was in.

Q. Where was that?

A. On the Hill.

Q. You started right out up there?

A. Yes, sir.

Q. Where were you from?

A. Fort Smith.

Q. What was your maiden name?

A. Railey.

Q. Did your folks live here?

A. No, sir; I have no people.

Q. Where did you come from when you came to Fort Smith?

A. I came from up in the Cherokee Nation.

Q. You were not raised in the Cherokee Nation?

A. No, sir; I was raised in Illinois.

Q. So you started your first house up there, and started out as the boss, running the house with two girls?

A. No, sir; I started out by my lone self.

Q. It was n't until afterwards you had any one with you?

A. Yes, sir.

Q. How many girls is the most you ever had one time?

A. I had three at one time.

Q. Three besides yourself?

A. Yes, sir.

Q. That made four?

A. Yes, sir.

Q. Had them all up there at Chippy Hill?

A. Yes, sir.

Q. How many houses of prostitution were there on that hill?

A. I think there were six houses up there, but I do n't know
188 whether they were all occupied at one time or not; I do n't think they were.

Q. You run one and Lulu run one, that is two; who run the others?

A. At one time there was a girl named Nora lived there, and she lived by herself; before she came there was a girl named Dolly Snow, and I think she sold out to Nora.

Q. That is all you know of those four?

A. Yes, sir.

Q. You did not hear any shooting at all?

A. No, sir.

Q. But the defendant came into your house and showed you his wounded arm?

A. Yes, sir.

Q. The only thing he told you was that he was shot?

A. He said he was wounded.

Q. Did he say that he had killed his man?

A. He said that he did not believe that he would bother him or anyone any more; that he had shot him; that he did not think he would bother anyone any more.

Q. Then you have not stated all he said; you started to tell what he said, but you didn't tell it; he told you that he was shot in the arm and he didn't think that the man would bother anyone any more?

A. Yes, sir.

Q. Did he say anything else about him?

A. I don't know what he said after I saw the blood; I was plumb prostrated by the sight of the blood.

Q. He told you that the man had called him a son of a bitch, did he not?

A. I believe he did.

Q. He told you that Yates had called him a son of a bitch, and he told you that he shot him for it?

A. He didn't say that he had killed him; he said he didn't think he would bother anyone any more.

189 Q. That Yates had called him a son of a bitch; did he tell you about the first quarrel they had?

A. No, sir.

Q. Did he not tell you that Yates hit him over the head with a pistol?

A. No, sir; if he did I didn't notice it.

Q. He told you that Yates called him a son of a bitch, and he would not bother him any more?

A. He said, "I don't think he will bother anyone any more?"

Q. Did he say that immediately after he told you that Yates had called him a son of a bitch?

A. I don't know; I went around behind the bed; I was so excited by the sight of the blood, and I became so weak I could not stand up.

Q. When was it that he told you that Yates had called him a son of a bitch, before or after he asked you to cut the ball out of his arm?

A. It must have been after I saw the blood, because it seems like a dream. I never would have thought of it at all——

Q. Do you think that he told you that he called him a son of a bitch before or after he told you he would not bother anybody any more?

A. It seems more like something I have heard than I ever saw. After I saw the blood——

Q. I don't care anything about that. You have told me that you intended to tell the truth about it. He told you there that Yates had called him a son of a bitch; you told me that, and now are you trying to get out of it?

A. I don't know whether he said it or I heard it; it seems so distant to me; I can't tell you. He said that Yates would never bother anyone any more, but I don't know whether he said that Yates called him a son of a bitch or whether somebody else has said it since.

Q. Why did you tell me that if you didn't know?

190 Mr. FREDERICK (of counsel for defense). I don't think that is fair of the witness. I do not think she has ever said for certain that he told her the man called him a son of a bitch.

At the request of the district attorney the court reporter here read from his notes the following question, to be found on page 177, second question from bottom:

Q. He told you that the man called him a son of a bitch, did he not?

A. I believe he did.

Mr. FREDERICK. She says she believes he did; she does not say for certain.

THE DISTRICT ATTORNEY. Q. What else did he tell you there about the fight?

A. I could not swear to what he said, because I do not know; I could not have stated it in an hour afterwards.

Q. You think that he did tell you that he didn't think he would bother anyone any more?

A. I know that.

Q. Did he tell you it was Yates?

A. No, sir; he didn't.

Q. Who did he say that it was?

A. He didn't say who it was.

Q. He would not tell you who it was?

A. No, sir; I don't think he said. I don't think he called any names.

Q. I supposed you asked him who it was that shot him?

A. No, sir; I didn't say nothing because I couldn't.

Q. You have told all you remember that he said to you?

A. Yes, sir; until I saw the blood on his arm, and the wound, I was perfectly composed, or tolerably composed, and when I saw the blood I became very nervous.

Q. You have told all now that he said, have you?

A. Yes, sir; all that I remember.

Q. And all that Yates said when he came?

191 A. Yes, sir; I was perfectly composed when Yates came.

Q. He threw a pistol in your face; that didn't disturb you?

A. No, sir; because I didn't think that he would use it.

Q. You saw the blood on this man's arm and it unstrung you?

A. I can't bear the sight of blood; it effects me more than anything else on earth.

Q. The pistol in your face didn't effect you much?

A. No, sir; because it wasn't the first time that Yates had a pistol in my face. I didn't think that he would use it.

Q. You knew that he would not use it?

A. He done such things. He had shot at me. He broke in my house in March ——

Q. Never mind that; we will not go into your troubles. I do not want to go into bawdy-house fights and rows; we have got enough of it besides yours. You think you have told all that occurred that night?

A. Yes, sir.

Q. When you went out there to the body did you find the pockets turned inside out?

A. There was other people to the body before ever I was.

Q. Did you find the pockets turned inside out?

A. I don't know whether they were or not. I never went up to the body, only just up to his feet. I never noticed his pockets at all.

Q. You did not turn his pockets inside out?

A. No, sir.

Q. You did not take his money?

A. No, sir.

Q. What other girl went out with you and Perry and sat on the rocks and watched the body?

A. Clyde Burke.

Q. Did she go to the body and rob it?

A. No, sir.

Q. Did Perry?

A. If he did I didn't see him. He came and waked us up.

192 Q. If Perry robbed the body you didn't see him?

A. No, sir; after I went with him he didn't.

Q. You did not see anybody rob the body, did you?

A. No, sir.

Q. You would not do a thing of that kind, would you?

A. No, sir.

Q. Notwithstanding the business you were at you would not rob a dead body, I suppose?

A. No, sir; I would not.

Q. Is Clyde here?

A. She is in Tennessee, I think.

Q. Lulu is here, is she not?
A. Yes, sir.
Q. Lulu Mays is her name?
A. Yes, sir.
Q. Is she married too?
A. I don't think she is.
Q. Where does she live?
A. I think she lives on the hill there.
Q. There was nothing else occurred that night that you saw or heard?
A. No, sir.
Q. You didn't see these Indians shooting around the house or near it?
A. No, sir; the houses were quite a little ways apart, and what went on at the other houses was nothing to me; I was never bothered anything about them. If I had heard it I wouldn't have noticed it any more than to turn over and go to sleep. I never heard a shot that night that I noticed.

193 Mr. FREDERICK (of counsel for defendant). At this point, if the court please, I want to recall the witness Abbott I had on the stand this morning to prove threats and character of the deceased. I think the foundation is sufficiently laid.

The COURT. I am disposed to let them go to the jury. I think I can guard them properly by the charge.

ROBERT J. ABBOTT, having been duly sworn upon behalf of the defense, and being recalled, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Question. Your name is R. J. Abbott?
A. Yes, sir.
Q. You were on the stand this forenoon. I will get you to go along without trouble of repeating the question and tell us what it was, tell us about that occurrence, and the conversation you had with Jim Yates?
A. On the evening that he was killed ——
Q. Tell us again what you told us this morning about Jim Yates coming to your store with the liquor and what he said?
A. My place of business was about 50 feet from where Mr. Hall run a grocery store.
Q. On the same side of the street you said this morning?
A. Yes, sir.
Q. You were in the restaurant business, I believe you say?
A. Yes, sir.
Q. And the defendant Hall had a grocery store?
A. Yes, sir.
Q. Tell about Yates coming to your restaurant?
A. Mr. Yates came in there along some time in the afternoon ——
Q. That was the day preceeding the night he was killed?

194 A. Yes, sir; about the third day of August, 1891. He left his revolver——
Q. He came in and left his revolver where?
A. With me; I put it on one of my shelves. He came in along, probably, about 5:00 o'clock, might have been a little later, and asked me for a glass of root beer and I set it out to him, and he pulled out a bottle of

whiskey and wanted to pour some of it in it and I told him I didn't allow that in there, and at that time Mr. Hall was passing by——

Q. At that time the defendant was passing by the door?

A. Yes, sir. He hollered at him to come in, and he walked right on just as if he didn't hear him, and he said, "I will kill that son of a bitch before morning," and he drank the beer and then poured out some whiskey in the glass and took a drink, and he poured a little out and shoved it back to me and said, "Give me my revolver," and I handed him his revolver, and he walked out.

Q. How much whiskey did he have?

A. He had close to a pint; I don't think there had been——

Q. What size bottle was it?

A. What I would call a pint bottle.

Q. Did you see him any more after that?

A. No, sir.

Q. How long had you known Jim Yates?

A. I had known him for a couple of years.

Q. Where had you known him; where had he been?

A. At Southtown, South McAlester.

Q. Do you know what his general reputation was up there for peace or violence?

A. I think so.

Q. What was it?

A. Bad.

Q. How long had you known this defendant Marshall Hall?

A. I knew him from along in the spring, in 1891, up to the time
195 of this trouble occurred.

Q. Did you know what his reputation was there for being a peaceable, law-abiding man?

A. Yes, sir.

Q. What was it?

A. It was good.

Cross-examination by the DISTRICT ATTORNEY:

Q. You say the defendant's reputation for peace is good?

A. Yes, sir.

Q. Had you heard that he killed a nigger man in Mississippi?

Mr. FREDERICK (of counsel for defense). I object to that question.

The COURT. I think it is competent to test his knowledge as to reputation.

The DISTRICT ATTORNEY. Had you heard that he had killed a man in Mississippi, a negro?

A. No, sir.

Q. Had you never heard that?

A. No, sir.

Q. Have you heard it now?

A. I have heard it since he has been arrested.

Q. You had not heard it before?

A. No, sir.

Q. Then you are not speaking of what his reputation is now, but what it was before?

A. I am speaking of what it was in South McAlester.

Q. You don't know what it was that caused him to go to the Indian country, did you; what made him leave Mississippi to go to the Indian country?

A. No, sir.

Q. You had known him how long?

A. Two months; he may have come in February or March.

196 Q. The killing was in August?

A. Yes, sir.

Q. You had known him five or six months?

A. Yes, sir.

Q. And during that time he had only killed one man?

A. I don't know that he killed any one. I didn't see him kill anybody.

Q. That is the reason you think that his reputation is good? A man does not make much reputation in six months, does he? If at the end of six months he kills a man at a whore-house brawl, can you testify that his reputation is good?

A. I don't know that it is.

Q. The truth of the matter is you don't know what is his reputation?

A. No, sir; only just what it was amongst the neighbors right there in the town.

Q. Do you think that a man can make a reputation in 6 months or five months?

A. He can establish what it is in that length of time.

Q. In that length of time he had killed a man, in five months after he came to this place, and you come here and swear that his reputation is good?

A. I don't know about that. I know what it was from the time that he came there until he left.

Q. Can a man make a reputation in that length of time? Do you know anything about it, in five or six months, whether he is the sort of a man that would kill a man or not?

A. The neighbors all spoke of him, and that is all I go by.

Q. They had no more knowledge than you had, did they?

A. I do not know about that.

Q. You don't know what his reputation was at the place that he came from?

A. No, sir.

Q. You do not know what he came away for, do you?

A. No, sir.

197 Q. You do not know except what you have heard since the killing?

A. No, sir; I know that he came there and started into the grocery business.

Q. You were selling beer there?

A. I was selling that kind of beer.

Q. You kept a saloon there?

A. I kept a lunch counter there, and I sold cider.

Q. Were you down here?

A. Yes, sir.

Q. Got you?
A. They fetched me down.
Q. You plead guilty?
A. No, sir; I didn't.
Q. You were convicted?
A. No, sir.
Q. What became of you?
A. I was set clear right here by the jury.
Q. You were tried?
A. Yes, sir.
Q. How many times have you been arrested?
A. I was arrested once down here and once in South McAlester. I came clear in both places.
A. Arrested in South McAlester for selling his beer?
A. Yes, sir.
Q. You didn't have any women at your place?
A. No, sir.
Q. They all lived on Chippy Hill?
A. Yes, sir.
Q. Are you still running that saloon?
A. I am running a restaurant there. I have got my folks living there.
Q. You are not selling beer?
A. No, sir.
Q. You have quit that?
A. I am not selling no kind of beer. I quit selling root beer and all kind of beer.
Q. I thought it was root beer that they sold up on Chippy Hill?
A. I don't know, only what some fellows told me.
Q. Are you a white man?
A. Yes, sir.
Q. How long have you lived there?
198 A. It will be three years in September.
Q. Where did you come from?
A. I came from the Cherokee Nation.
Q. Where did you come from to the Cherokee Nation?
A. I came from Fayetteville, Arkansas.
Q. When did you leave Fayetteville?
A. I left there in the spring of 1889, I think.
Q. What did you leave there for?
A. I left to hunt a better location.
Q. Is that all?
A. That is all I left for.
Q. No charges against you in Fayetteville?
A. No, sir.
Q. You say that Mr. Yates left a pistol with you?
A. Yes, sir; he had left his pistol with me several times before.
Q. When he came into your saloon he got a bottle of beer?
A. He got a glass of beer; of root beer.
Q. Was he tight?
A. I could not tell you whether he was tight or not.
Q. You ought to be able to tell me whether, in your opinion, he was?

A. I don't think he was out of the way any.
Q. Then he wasn't tight?
A. I don't think he was; I could not tell. Of course I could not tell whether he was tight or not, but I don't think he was.
Q. He called the defendant into the house?
A. Yes, sir; he passed the door. When he would not come in he said, "I will kill that son of a bitch before morning."
Q. He said it in earnest, did he not?
Q. I would take it that way.
Q. You took it to be in earnest? He wasn't laughing, merely cracking a joke?
A. No, sir.
199 Q. What was he going to kill him for?
A. He did not tell me.
Q. Had they ever had a quarrel in their lives?
A. I don't know.
Q. Don't you know they hadn't?
A. I don't know if they had or hadn't.
Q. Did you ever hear of their having a quarrel?
A. No, sir.
Q. What was he going to kill him for?
A. Well, I do not know.
Q. You do not know of their having any quarrel? He did not tell you that they had had any quarrel; simply said that he was going to kill him?
A. When he didn't come in he said, "I will kill that son of a bitch before morning."
Q. What hour of day was that?
A. It might have been five o'clock, might have been a little later.
Q. About sundown?
A. No, sir.
Q. Not sundown?
A. No, sir.
Q. About five o'clock, you think?
A. Yes, sir; about that time.
Q. Did he tell you anything about the defendant having a knife in his shoe?
A. No, sir; I never saw him with any knife or any pistol.
Q. I never asked you that; I asked you if Yates told you anything about the defendant being armed with a knife?
A. No, sir; never said anything about it.
Q. You never knew of the defendant carrying a knife?
A. No, sir.
Q. If you had been told that the defendant was a man who owned a pistol and carried a knife in his shoe would you still be willing to testify that his character was good?
A. I don't know as I would. I go just by what the neighbors say.
200 Q. If the neighbors had told you that he was that kind of a man——
A. Everybody in that town that ever talked to me talked in his favor.

Q. If you had been told that he carried a knife in his boot, would you still be willing to swear that he was a man of good character, good reputation?

A. Nobody ever told me that.

Q. Well, if you had been told that?

A. That would be owing to circumstances; if he had it to defend himself——

Q. People always carry knives in their shoes to defend themselves?

Q. I don't know anything about that; I never did it, or a pistol either.

201 B. F. ROBERTS, having been duly sworn upon behalf of the defense, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Question. What is your name?

Answer. B. F. Roberts.

Q. Do you know this defendant?

A. Yes, sir.

Q. Did you know Jim Yates in his lifetime?

A. Yes, sir.

Q. How long had you known Yates?

A. About 2 years I guess.

Q. Where did you know him?

A. I knew him at McAlester.

Q. I will ask you if you ever heard him make any threats against this defendant Hall?

A. Yes, sir; I did.

Q. When was it with regard to his being killed, how long before he was killed?

A. I think it was about the first or second of August.

Q. Go on and tell the circumstances, what you heard him say.

A. I was going from the livery stable, going home, and I heard some talking right ahead of me. It was dark, and I thought it was a couple of men maybe quarreling, had some racket, and I walked up right close to them. It was Mr. Smith and Mr. Yates.

Q. What Smith was that?

A. William Smith.

Q. Is he the one that is dead now?

A. Yes, sir; they seemed to be both drinking, and Mr. Yates told Mr. Smith if he would go and bring Mr. Marshal. He said, "You get Mr. Marshal," he says, "and bring him over to Chippy Hill;" tell him, he says, "there is a soft snap over there; get him to come over there with you and I will do him up; I have got it in for him anyhow," and he said, "the damned son of a bitch, I will do him up." They were

202 both drunk at the time they were talking.

Q. "Tell him there was a soft snap, and get him over there; I have got it in for him, the damned son of a b'tch, and I will do him up"?

A. Yes, sir; that is what he told him.

Q. Do you know what Yates's reputation was for being a peaceable or vi'lent man?

A. It was bad there.

Q. He was a man of violence, a man who would get into trouble, quarrels and fights?

A. Yes, sir; it seems to.

Q. Do you know this man called Dad Depew?

A. Yes, sir.

Q. How long have you known him?

A. I have known him some couple of years I guess, maybe three.

Q. Do you know what his general reputation for truth is in the neighborhood in which he lives?

A. I could not say as to truth.

Q. As to truth or untruth?

A. I don't know, sir, anything about him.

Q. A man's reputation is how the people generally regard him, as to any trait of character involved, not how you or any one person regard him; not of your own knowledge, but how one is regarded by the people generally among whom he lives?

A. I don't know anything about the general reputation of the man for truth.

Q. You never heard that discussed then?

A. No, sir.

Q. I will ask you if you know the reputation of this defendant up there as to being a peaceable, law-abiding man?

A. It is good as far as I know.

Q. Did you know Jim Yates's pistol?

A. I am not positive that I did know it. If I ever had it in my hand it was the morning that he was laying a corpse there.

Q. You could not say you knew his pistol?

A. No, sir.

203 Cross-examination by the DISTRICT ATTORNEY:

Q. What is your business?

A. Laborer.

Q. You never have been down here before, have you?

A. No, sir.

Q. What is our business; laboring at what? Are you employed at the livery stable?

A. No, sir; I have worked there for the livery stable, but I work there for the Choctaw Company ten months.

Q. You listened to what they were saying—slipped up on them?

A. I was walking right up on them; they were right to my left as I walked up; they were standing at the side of the road at the gate.

Q. And Yates said: "You go and get Marshal to come up on Chippy Hill and I will do him up?"

A. Yes, sir; he says "Tell him there is a soft snap up there."

Q. Wanted him to come up there and get into a game of cards, did he not?

A. I don't know only what they said.

Q. You don't know when he said "I will do him up," whether he meant he would beat him at a game of cards or anything else?

A. No, sir.

Q. You can not tell whether that was what he meant or not?

A. No, sir; only what he said.

Q. Just simp'y said: "Tell him to come up there on the Hill; tell him there is a soft snap there, and when I get him there I will do him up"?

A. Yes, sir.

Q. That is about the way of it?

A. Yes, sir.

Q. Yates said to Smith: "You go and get Marshal and get him to go up on to Chippy Hill, and tell him that he has got a soft snap up there, and when he gets up there I will do him up"?

204 A. Yes, sir; he says: "I have got it in for the son of a bitch."

Q. He didn't seem to be mad; they were talking and he was laughing, was he not?

A. No, sir; they were drunk and talking, and I could not tell whether they were mad or not, and I could not tell whether they were laughing or not.

Q. Did they say anything about cards while you were there?

A. No, sir; not a word.

Q. That is all they said?

A. That is all I heard. I passed on, and I didn't hear anything else.

Q. You just happened to pass by them as that was said?

A. Yes, sir; I heard that much of it.

Q. Yates and the defendant had never had any quarrel or any difficulty before that?

A. No, sir; I never heard of them having any.

Q. Nothing before that?

A. That is the first thing I ever heard.

Q. You say the defendant's character is good. How long have you known him?

A. I don't know.

Q. Two or three months?

A. Yes, sir; a couple of months, I expect.

Q. You knew him a couple of months?

A. Yes, sir; I think I did.

Q. And at the end of that time he killed a man in a bawdy house, in a fight, yet you say in that length of time you can know what a man's reputation is.

Mr. FREDERICK (of counsel for defense). I object to that question.

The DISTRICT ATTORNEY. Can a man make a reputation in two month's time? Is it not a thing that is built up little by litt'e in your estimation? I want to get your idea of what reputation is. Do you think that any many can establish a reputation in two months'

205 time? What do you think about it? Had you heard that he had killed a negro in Mississippi; that he was a refugee from justice out there?

A. No, sir; I had not heard it up to that time.

Q. Up to that time you had not heard it?

A. No, sir.

Q. It may have been so and you not heard it?

A. Yes, sir.

Q. Well, sir, do you still think that you can know a man's reputation in two months? a stranger coming into the country stays there two months

and at the end of that time at a bawdy house kills a man, are you still ready to say that you were in a situation you know his reputation? (After a pause.) Certainly you do not insist on that?

A. It was good as far as I knew him.

Q. What you mean by that is he did not kill anybody up to that time?

A. Not that I know of.

Q. He had not killed anybody or been in a fight up to that time?

A. No, sir.

Q. Did you know when he talked about his reputation being good that he was the kind of a man that carried a dagger in his shoe?

A. No, sir; I never seen it.

Q. Had you heard that he carried one that way?

A. I heard somebody say that he had one. But I never saw it.

Q. Was that before the killing?

A. No, sir; afterwards.

Q. You did not hear before the killing that he carried a dagger in his bootleg?

A. No, sir.

Q. If you had heard that would you still have been willing to swear that his reputation was good?

A. I don't know that I would.

Q. What do you mean by a man's reputation being good?

A. The way that he conducts himself, as far as I know.

206 Q. You do not mean by reputation what people say about a man; that would be hearsay would it not?

A. Yes, sir.

Q. It is simply what you know of the man yourself?

A. Yes, sir; his reputation was good as far as I know, as long as I was acquainted with him.

Q. You answered my question, and you can go.

Redirect examination:

By Mr. C. J. FREDERICK. Did I understand you to say you had only known him two months?

A. I might have known him longer.

Q. How long did you know him during the time that he lived there? Did you know him all the time that he lived there?

A. Yes, sir; about all the time; something near it.

207 ED. G. SPRAGUE, having been duly sworn upon behalf of the defense, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Question. What is your name?

Answer. Edward Sprague.

Q. Do you know this defendant?

A. Yes, sir.

Q. How long have you known him?

A. I knew him all the time that he was in South McAlester; I don't know how long that was.

Q. You knew him what time he lived in South McAlester?

A. Yes, sir.
Q. Did you know Jim Yates?
A. Yes, sir.
Q. How long did you know Jim?
A. I knew him about 4 years.
Q. Did you know what his general reputation was in that community as to being a violent man?
A. Yes, sir.
Q. What was it, good or bad?
A. It was bad.
Q. He was regarded as a dangerous man?
A. Yes, sir; one of the most dangerous men in the Territory.
The DISTRICT ATTORNEY. Is he allowed to ask that question? He says he regards him as the most dangerous man in the Territory.
The COURT. His opinion is not competent, of course.
Mr. FREDERICK. How was he regarded in that community?
A. He was regarded as dangerous man.
Q. By the people generally?
A. Yes, sir.
Q. You say you know the defendant?
A. Yes, sir.
Q. What was his general reputation as a peaceable law-abiding man?
A. It was good.
Q. Do you know Micky Free?
A. Yes, sir.
208 Q. I will ask you if you had a conversation after this killing with Micky in which he told you what Yates said to him in regard to getting this defendant to go up on Chippy Hill?
A. Yes, sir; he told me what him and Yates said together.
Q. What did he tell you?
A. He said that he was going to get him up there to skin him.
Q. Is that all he told you?
A. No, sir; he told me very nearly the whole thing over *a*again; when we came down here on these Choctaw beer cases he told me about it, and I have very nearly forgotten it, but he said that Yates came to him and said that he thought that Hall had *d*ome money, and if they could get him up on the hill they could skin him, and after that I remember of him saying that Bob had a knife; he told Yates that Bob had a knife, and he did not want to go up there, and Yates said, "Well, I will make the son of a bitch eat it," or "I will kill the son of a bitch, I will make the son of a bitch eat it," or "kill the son of a bitch if he takes it up there," and he went on to tell me about having some money of his own. He said he had 12 or 13 dollars and he left it all at home except two.
Q. It is only with regard to that proposition as to what Yates said that I want?
A. That is about as much as I can recollect of it; I remember a part of it; it has been a good long while ago.

Cross-examination:

By the DISTRICT ATTORNEY. He said he told Yates that Bob had a knife?
A. Yes, sir.

Q. He told you that Bob carried it in his shoe, did he not?
A. Yes, sir; I believe he did.
Q. Yates said if Robert drew his knife on him he would do so and so?
A. I don't think he said if he drew his knife.
209 Q. You do not remember anything else that he said, though?
A. No, sir; I don't remember anything else.
Q. What was it he said about making him eat it?
A. "I will make him eat it, or I will kill the son of a bitch."
Q. Didn't say anything about "if he draws it?"
A. I could not be right positive about it.
Q. If Micky tells it just like you do with that exception, then what?
A. I expect likely that would be the way, I don't know. It don't seem to me like it was.
Q. He told you that they were going to take him up there to play a game of poker?
A. Yes, sir.
Q. To get a game out of him?
A. Yes, sir.
Q. That he was armed with a knife that he carried in his shoe, a big dagger?
A. He didn't say what kind of a knife it was.
Q. He told you about telling Yates about it, so Yates knew he was armed, did he not?
A. I suppose he did.
Q. Did he tell you how the fight occurred?
A. Yes, sir; he told me the whole thing, but I do not recollect it.
Q. Were you down here with the beer men?
A. Yes, sir.
Q. As a witness?
A. Yes, sir.
Q. As a witness for them?
A. Yes, sir.
Q. You were here on what case?
A. The Bates case.
Q. You came down here to swear his beer wouldn't make anybody drunk?
A. Yes, sir.
Q. You were not arrested yourself?
A. No, sir.
Q. Never have been arrested?
A. No, sir.
Q. Never have been brought down here?
A. No, sir.
Q. What is your business?
A. Paper-hanger.
210 Q. You think Marshal's repatation is good?
A. Yes, sir.
Q. What name did he go by?
A. He went by the name of Hall?
Q. By the name of Hall?
A. No; by the name of Bob Marshal.

Q. What is his name now?

A. Bob Marshal Hall, I believe.

Q. Do you know why he changed his name, this man who has got a good reputation?

A. No, sir; I don't know; I know that he was accused of a crime in Mississippi.

Q. What crime?

A. Murder.

Q. What murder? Killing who?

A. I believe it was a nigger.

Q. Was it not two *big*gers?

A. I don't know; I understood it was one nigger.

Q. You understood that it was one. You say that he was a man of good reputation?

A. I learned this afterwards.

Q. You did not learn that he carried a knife in his shoe until afterwards?

A. No, sir.

Q. Do you think, now, with your experience in this case, that you can tell anything about a man's reputation in four or five months, or 6 months, a stranger that come into your country?

A. Yes, sir.

Q. You think a man can establish a reputation in that length of time?

A. Yes, sir; I think he established a reputation there.

Q. Reputation is not a thing then, that is made little by little, but he makes it all one time?

A. If he is a man that I can trust and put confidence in I think he has got a good reputation.

Q. How do you get at his reputation?

A. By what the people generally say about him.

Q. The people talking around there generally?

A. Yes, sir.

Q. They talked a good deal about him, didn't they?

A. Yes, sir.

211 Q. What were they talking about him for?

A. Since this thing has been done they have talked about it.

Q. I am not speaking about that; I want to know what was said before this thing occurred. Since then, of course, you have heard of these other things. You mean, do you, by a good reputation what people have said since that time?

A. And before?

Q. Both before and since?

A. Yes, sir.

Q. Since then you have been told that he carried a big dirk knife in his sh'e; you have learned that he killed a nigger in Mississippi; you know that he came there under an assumed name, and yet you come down here and swear that his reputation is good from the opinion you have got since?

A. Yes, sir.

Q. How many niggers has a man got to kill, and how many knives has he got to carry in his shoes, before he has a good reputation?

Mr. FREDERICK (of counsel for defense). I object to the question. A witness is not asked what is a man's reputation from his cradle up, but the reputation in that community where he resides. A man may have been a man of evil habits and reformed, or he may have killed a man and yet be a man of moral reputation. Simply because a man kills another the presumption is not that he is not a man of good reputation. Some of the best men that live have done that, and have done it in a justifiable and legal way.

The DISTRICT ATTORNEY. This witness has stated that he made up his estimate of the defendant's character from what the people said before and after this killing. He has stated that he learned since the killing, from Micky Free, that the defendant carried a knife in his boot leg; he
212 had learned that he had fled from Mississippi for the crime of murder, for killing a negro there; he has learned that he lived in this community, where he established this good name and good reputation under an assumed name; he has stated that. Now, with that knowledge in his possession, having heard that, he comes upon the stand and swears from the knowledge that he has received before and since that he is a man of good reputation. I want to find out what is his estimate of a good reputation. When he learns that a man has fled from his home for the crime of murder, he learns afterward that he has killed a man, he learned that he is the character of a man that carries a knife in his boot leg; he knows that he has fled from his country just as he had learned that he had fled from Mississippi for killing a man there, and yet he is willing to swear that the man had a good reputation. Now, I want to find out what, in his opinion, it takes to make a man a man of good reputation. That is what I would like to know.

The COURT. Almost every man that comes upon the stand to impeach or sustain the character of another gives his own judgment as to what the character is, and I think it is entirely proper to probe the witness as to what he bases his judgment on. This witness voluntarily stated that he made up his estimate of character, or gave his opinion of how the people generally regarded him, from what he knows since and before. It is entirely proper to probe a witness to find if he is a man competent to make up a correct conclusion as to what the popular judgment in that regard is. There is a great difference in different minds as to whether a man is a man of good or bad character. A man may be a man of lawless and desperate character in the estimation of some people, and in the estimation of others he
213 is a man of the most excellent character. It is correct to ascertain what the witness's estimate of character is, because in nine cases out of ten a man that comes to sustain or impeach it gives his own judgment. He says it is the popular judgment, and when you come to probe him you find out it is his own conclusion. You have a right to know whether it is his own 'clusion or the conclusions of others. You have a right to know what his estimate of good character is, what is his standard.

Mr. FREDERICK. We save the point. It is not so much the source of inquiry as the manner in getting at the question.

Redirect examination:

Mr. FREDERICK. I will ask you if you answer in regard to his reputation by giving what the people generally in South McAlester say about Hall; is that it?

A. Yes, sir; from what the people say there.

214 JOHN J. MCCARTHY, having been duly sworn upon behalf of the defense, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Question. What is your name?

Answer. J. J. McCarthy.

Q. Where do you live?

A. At South McAlester.

Q. Do you know this defendant, Robert Hall?

A. Yes, sir.

Q. Where did you know him?

A. South McAlester.

Q. How long did you know him?

A. Something over three months.

Q. Did you know Jim Yates?

A. Yes, sir.

Q. How long did you know Yates?

A. I knew Jim Yates over two years.

Q. Did you know Jim Yates' reputation for peace or violence in the community where he lived? Reputation is how he is generally regarded among the people among whom he lives and moved.

A. I do not suppose it was very good, as far as I know.

Q. Do you know what the reputation of the defendant was as to being a peaceable, law-abiding man?

A. I don't know anything against his reputation.

Q. Do you know what it is; how he was generally regarded?

A. As *a*far as I know he had a very good reputation.

The COURT. Answer the question not as far as you know, but as far as the people generally say. Do you know how the people generally regard him?

A. It was good, I guess.

Q. That is not the question. You were not asked that question. Do you know how the people generally regard him in the community there? Answer that yes or no. You are asked the question not whether it is good or bad of your own knowledge, but how the people gener-

215 ally regard him.

A. I could not say as to that then.

Q. Then you can not answer.

Mr. FREDERICK. You could not say as to what?

A. As to Mr. Hall's reputation.

Q. You could not say how the people regard him? You do not know how the people regarded him in the community where he lived?

A. They regarded him, as far as I know ——

The COURT. That does not answer the question. Do you know how the people generally regarded him there as a peaceable, law-abiding man? Do you know that? If you know how they generally regarded him you answer that yes or no. Do you know how they generally regard him?

A. It was good; yes, sir.

Mr. FREDERICK. What makes you say it was good? Is it because you know how the people regard it? Is that what makes you say it was good?

The COURT. I do not think this witness has intelligence enough to testify.

Mr. FREDERICK. That question seems to be a puzzle to a great many witnesses who otherwise seem intelligent.

The COURT. He is incapable of learning; he certainly is not a competent witness to know what a man's character is. You can press him on that and get it out of him if you can.

216 R. PINK HOOPER, having been duly sworn upon behalf of the defense, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Question. What is your name?

Answer. R. Pink Hooper.

Q. Where do you live?

A. At South McAelster.

Q. How long have you lived there?

A. 16 months.

Q. What business are you following there?

A. Restaurant business.

Q. Did you know Jim Yates in his life time?

A. Yes, sir; I knew the gentleman.

Q. How long did you know him?

A. I knew him about 4 months.

Q. Do you know what his general reputation was in that community for peace or violence? You must answer first whether you know it or not?

A. Yes, sir.

Q. Was it good or bad?

A. It was not very good; it was bad.

Q. Do you know a man called Dad Depew?

A. Yes, sir.

Q. How long have you known him?

A. About 12 months.

Q. Do you know his general reputation in that community there for truth?

A. Nothing more than I have heard.

Q. That is it, of course. It is how he is generally regarded by the people in that regard, as to truthfulness?

A. Not very good.

Q. You say you know the defendant?

A. Yes, sir.

Q. Do you know what his reputation was for peace or violence in that cummunity?

A. It was good, as far as I know.

217 Cross-examination by the DISTRICT ATTORNEY:

Q. How long did you say you had lived in McAlester?

A. About 16 months.

Q. Where did you come from?

A. I have been in the Territory; I went from this State to the Territory.

Q. What part of this State?
A. East of here, 45 miles, in Paris, Logan County.
Q. How long did you know the defendant?
A. About 16 months.
Q. How long did you know him before this killing?
A. About 4 months. Probably a little over that.
Q. When you speak of the defendant's reputation as to being a good man, you mean reputation that he had made up to the time of the killing, or up to this time?
A. Before the killing.
Q. How long had you known him before the killing?
A. About four months.
Q. You knew his reputation?
A. Yes, sir.
Q. In your judgment, can a man in four months make a reputation for himself, unless it be a bad one?
A. It is considered in this way; the way a man governs himself is the way I would look at it.
Q. You think you can form an estimate of a man's character in four months' time?
A. It is from what I heard before and since.
Q. You have heard since this thing occurred that he killed a nigger in Mississippi, havn't you?
A. Yes, sir.
Q. You know now that he lived under an assumed name while he was in McAlester, don't you?
A. He went by the name of Robert Marshal.
218 Q. You know now his name is Hall?
A. No, sir; I can't swear to it.
Q. You have heard it, haven't you?
A. Yes, sir.
Q. You believe it, do you not?
A. I have a right to believe it; yes, sir.
Q. You have seen his father?
A. Yes, sir.
Q. You know his name is Hall; you know the defendant was living in McAlester under a different name from that of his father?
A. Yes, sir.
Q. Men generally have their father's names in this country?
A. Yes, sir.
Q. You know that, don't you?
A. Yes, sir.
Q. Did you learn anything about his wearing a knife in his boot leg?
A. No, sir? I never heard of it; I have heard it mentioned since that time.
Q. From what you have heard before and since you have formed an estimate of his character; you have learned since that he killed a man at McAlester and fled the country?
A. Yes, sir; I heard that.

Q. And upon these things you have heard about him you swear that he is a man of good character?

A. Up to that time; up to the time I knew of.

Q. But you say you formed your opinion of his being a man of good character since you learned that he killed a negro in Mississippi before that time, and it was during that time that he was living under an assumed name?

A. Up to the time that he left there he was a man that was well thought of in that community, and walked as a gentleman; treated everybody with courtesy and kindness.

219 Q. That is not the question; a great many bad men do that. All you know about his character there he did not kill anybody up to that time?

A. Yes, sir.

Q. He lived there four months before he killed a man?

A. Yes, sir.

Q. That is what you mean? Then it is just like any other man that lived in that community who didn't kill a man, you would be willing to swear that his character was good; a man that had killed a man in another community and then came into yours and lived four months without killing anybody, and at the end of that time kills a man and flees the country, you are willing to swear that his reputation is good?

A. I don't know that he killed that man yet.

Q. A man's reputation is what people say about him, not what you know yourself?

A. If a man keeps himself in good company wouldn't you honor him as a gentleman?

Q. He kept company with Jim Yates and went up to Chippy Hill a good deal, did he not?

A. I never seen either one of them up there.

Q. You knew he was with Depew some, didn't you?

A. No, sir.

Q. You saw him with Yates?

A. Yes, sir.

Q. Then he was keeping good company?

A. How was a man to get out of it? He was in business there, and Yates would come around him; that is the time I saw him there when he was in the grocery business, and the parties would come around him, and how would he keep out of their company. That is the only way I saw them together.

Q. You are willing, now, to swear that you know the man's repu-
220 tation when he had only lived in your community four months; you are willing to swear that his reputation is good?

A. So far as he lived there, as long as he lived there, as far as I know, his reputation was good.

Re-direct examination.

Mr. FREDERICK. You heard that he killed a negro in Mississippi; didn't you also hear that he had been acquitted of it?

A. Yes, sir.

Q. You heard that he killed Yates up on Chippy Hill?

A. Yes, sir.

Re-cross-examination by the DISTRICT ATTORNEY:

Q. How did you hear that he was acquitted of the killing in Mississippi?

A. I saw it in the paper, and I heard other parties speak about it.

Q. He had the trial after he went back from here?

A. Yes, sir.

Q. You saw it in the paper before he was arrested.

A. No, sir.

Q. It was after he was arrested here?

A. Yes, sir.

Q. Who was it that was acquitted, Robert Hal or Robert Marshal?

A. Robert M. Hall.

Q. How do you know he is the man?

A. I do n't know he is the man.

Q. You say that a man named Robert M. Hall?

A. Yes, sir.

Q. But this man's name was Robert Marshal when he lived with you?

A. He went by that name.

Mr. FREDERICK. You understand this is the same man?

A. Yes, sir; this is the same man that was up there in McAlester.

221 JOHN RIDENHOUR, having been duly sworn upon behalf of the defense, was examined by Mr. C. J. Frederick, and testified as follows, to-wit:

Q. Your name is John Ridenhour?

A. Yes, sir.

Q. Where do you live?

A. South McAlester, Indian Territory.

Q. Do you know this defendant?

A. Yes, sir; I know him.

Q. Where did you know him?

A. I knew him in South McAlester.

Q. How long did you know him there?

A. I knew him from some time in July until along in—I went there about the second or third of July, he was running a store there when I went there, and then I went to my father's; I do n't remember how long I was there. I was there until after the 4th some time. I went to my father's and was gone a week or two on a visit up here in Washington county; that was in July, and I came back on the 10th day of August.

Q. It was after Yates was killed that you came back?

A. Yes, sir.

Q. Do you know Micky Free?

A. Yes, sir.

Q. I will ask you if Micky Free made any statement to you or told you anything concerning what Yates said to you about getting this defendant to go up on Chippy Hill that night.

A. He came into the store there one morning after I had bought the store out, I don't remember how long it was, a few days afterwards, and we were talking, and I asked Micky how it was, and he said Mr. Yates came up there one evening and called him out and told him that he wanted him to go and get Mr. Marshal, that he wanted to have a game of poker,

and to get Mr. Hall up and they would take him up on the hill
222 and have a game of poker; he said he thought Mr. Hall had about 60 or 70 dollars, that he needed to make a winning, had to go off somewhere, had some work, and he wanted to make a little winning. Micky said they went to his store and talked awhile and was drinking, and he said he took Jim out and told him that he didn't want to go up there, that the defendant had a knife, and he said he was afraid there would be trouble some way or another, and Jim told him to come on, it didn't make any difference, that he would make him swallow the knife or eat it, or something like that; I don't just remember how it was. About that time somebody called me to wait on them, and I went and waited on them, and Micky went off.

Q. Did you buy Robert's store, the place he was running?

A. Yes, sir.

Q. Who did you buy that from?

A. His father, Mr. Hall.

Q. When did you buy it?

A. The 11th day of August; I bought it on the night of the 10th and invoiced the 11th.

Q. Where were the goods?

A. In the storehouse there.

Q. All the goods that belonged to the stock?

A. Yes, sir.

Q. Were there any in the depot?

A. There was some meat at the depot; Mr. Hall said I could have it, and when I went over to get the meat I didn't have the bill of lading, and they would not let me have it.

Q. Do you know Jim Yates's reputation in that community for being a man of violence?

A. I know what the people said about it.

Q. Can you answer from what the people say?

A. The people say it is very bad.

Q. You must answer, yes or no, whether you know or not his general reputation?

A. I know what the people say about it.

223 Q. Then you can say "yes"?

A. Yes, sir.

Q. What is it, good or bad?

A. It is very bad.

Q. Do you know this man Depew they call Dad Depew?

A. Yes, sir; I have seen him around there a right smart.

Q. Do you know his general reputation in the community where he lives for truth?

A. I know what the people say about it.

Q. That is how a man's reputation is made; how he is generally regarded among the people among whom he moves; with that explanation can you say whether you know his general reputation or not for truth? Answer yes or no.

A. I know what the people say about it.

Q. Can you answer yes or no to it?

A. Yes, sir.

Q. Is it good or bad?
A. It is very bad.

Cross-examination:

By the DISTRICT ATTORNEY. I suppose you have heard a great many people say so, haven't you?
A. Yes, sir; I have.
Q. Who have you heard?
A. I have heard old man McCarthy.
Q. Is he here?
A. Yes, sir.
Q. Who else?
A. Ed. Sprague.
Q. Is he here?
A. Yes, sir.
Q. You heard them since you came down here?
A. I have heard it always, ever since I have been there in the town.
Q. Who else?
A. Pink Hooper.
Q. I suppose Sprague would know more about that than you, would he not?
A. I suppose he would.
Q. I suppose McCarthy would know more about it than you, would he not?
A. Yes, sir; I expect they knew him a little longer than I
224 have..
Q. Both of them have been on the stand?
A. Yes, sir.
Q. You have heard McCarthy and Sprague both say so?
A. Yes, sir.
Q. Who else?
A. Dad Yandell.
Q. Is Dad Yandell here?
A. Yes, sir.
Q. Anybody else?
A. I will be dogged if I know; I could not tell you, any more than I never heard anything good of him.
Q. Did I ask you that question?
A. No, sir.
Q. Have you any feeling in this case?
A. Well, I don't know.
Q. Are you and Depew friends?
A. Yes, sir.
Q. Why is it that you are interjecting that when you were not asked it? Have you any feeling in this matter?
A. You asked me who else.
Q. I asked you who else you heard say that he wasn't truthful?
A. I don't know that; I can't call any more names; I have called several.
Q. You have called your names, and three of them have been on the stand.
A. I heard Pat Gleason say so.

Q. Is he here?
A. Yes, sir.
Q. You bought the goods; you got possession of the goods of this defendant?
A. Yes, sir.
Q. What did you pay for them?
A. They invoiced—I forget now—but one hundred and forty some odd dollars.
Q. What did you pay for them?
A. I paid the money for them.
Q. How much?
A. I believe they invoiced one hundred and forty some odd dollars, as well as I recollect.
Q. How much money did you pay for them?
A. One hundred and forty some odd dollars.
Q. What were they worth?
225 A. They were worth one hundred and *d*orty odd dollars.
Q. That is what you paid for these goods that he was selling there?
A. Yes, sir.
Q. A small business?
A. Yes, sir.
Q. What were the goods?
A. There was sugar, and——
Q. When did you see his father there to buy them of him?
A. On the night of the 10th of August.
Q. Did he tell you where his son was?
A. No, sir; he didn't know where he was——
Q. You were not informed as to where the defendant was when his father came up there?
A. No, sir.
Q. How long after the killing was it that the father came there?
A. I could not tell you; I came home on the night of the tenth of August, and when I came home his father was there then.
Q. Do you know how long he had been there?
A. No, sir.
Q. You found him there?
A. Yes, sir.
Q. You bargained with him and got the goods?
A. Yes, sir.
Q. Did you get them cheap?
A. Yes, sir.
Q. About half what they were worth, didn't you?
A. No, sir; I didn't get them that much less.
Q. A fourth?
A. No, sir; he invoiced the goods at price and knocked off the freight.
Q. Anything else?
A. No, sir.
Q. You bought them at the purchase price, less the freight?
A. Yes, sir; the freight was already paid on them. He did not charge me any freight.

226 Redirect examination:

By Mr. FREDERICK. What was the value of the goods at the depot you didn't get?

A. I don't know. Finally, in some six or seven days, they offered them to me, and I told them I had ordered meat then and I wouldn't take it.

227 JIM WALKER, having been duly sworn upon behalf of the defense, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Question. What is your name?

Answer. Jim Walker.

Q. Where do you live?

A. McAlester.

Q. You are a Choctaw Indian are you?

A. Yes, sir.

Q. Do you know this man they call Jim Yates up there?

A. Yes, sir.

Q. Where was he the last time you saw him?

A. I can't tell anything about it, but the first Monday in August, night, 1891; they said it was the same fellow when I came by that night.

Q. You came up there that night; where did you see him?

A. Right there on the hill; I forget it.

Q. Chippy Hill?

A. Yes, sir; that was him.

Q. Who were with you?

A. Joe Jefferson, and John Keith, and David Mish-an-o-wa-to-ba.

Q. Four of you?

A. Yes, sir.

Q. How were you travelling—riding or walking?

A. Riding.

Q. How did you happen to see this man Yates?

A. We go up to the house to get some beer.

Q. Go on now.

A. We came right up just the edge of the light, and we called for hello.

Q. You said "hello."

A. Yes, sir; and he came out of the house, and he had a six-shooter, and he just held the six-shooter in his hand, throwed it up around this way to me; I was riding on a horse, standing just at the edge of the
228 light outside in the yard and he throwed it on to me, the pistol, right this way, and he catched me around my neck; I reckon he tried to throw me off, I don't know; he was drunk. He said, "Who are you?" And I said, "Jim." That is my name; I guess he knew me. He says, "Damned Indians can't get any beer." He was drinking; I know that was the reason. About that time—he was hanging to my neck—he was around it, and the horse got scared, started off, and held bridle, and I don't know which hand, right hand I reckon, just hugged me this way, and he liked to pull me off of my horse there. In a short while he turned me loose, and started up to the other fellow back here; he did, I reckon, I could not see at that time; I could not tell anything what he did. That is all I can tell I heard. And about that time I went off, he was talking to them in the dark, to the rest of the boys; that is all as far

as I saw. He turned me loose; we can't get any beer there; I guess we will go on home. We started off, and I don't know just the distance we got; this Mish-an-o-wa-to-ba, he is an officer, county officer; he had a pistol with him, and he shot it off; fired five or six shots I reckon; I could not say how many shots; he fired the pistol a good deal; when we started off away from there, and the guns at the house fired; we heard a gun fired at the house. That is the last we heard.

Q. Who was it shot the gun at the house?

A. I don't know anything about it at all.

Q. How many times did it fire at the house?

A. I could not tell anything about it; I never counted.

Q. Did you hear any more guns fire?

A. Yes, sir; we heard more than two or three at the house.

Q. Did you hear any more after that over here anywhere?

229 A. No, sir, I never heard any more.

Q. Did you hear any more anywhere else?

A. I didn't hear anybody else shoot only this deputy county sheriff; he was shooting off five or six shots; that is all I know. He was behind back here of me; I was ahead of him; he was behind back a shooting this Mish-an-a-to-ba.

Q. How far from the house?

A. I could not say how far.

Q. That is all you saw of him?

A. Yes, sir.

Q. Is that all this man Yates said to you; did he not say to you "Who are you," and you said your name was Jim?

A. Yes, sir.

Q. Didn't he say that you "God damned Indians can't get any beer"?

A. "Damned Indians can not get any beer"; I reckon he knew me; I could not tell anything about it; it was in the night; we just came up; we never went in at all; we never stopped but just a few minutes.

Q. Did you know him before that?

A. Yes, sir; I was well acquainted. I never thought about him coming down there.

Q. You were well acquainted with him?

A. Yes, sir.

Q. When you saw who it was you left?

A. Yes, sir. I understood, I heard there was a man killed; that is all I know.

Q. You found it was Jim Yates there that night?

A. Yes, sir; that is what I heard that he got killed there.

Q. Did you know who the man was that was talking to you, what his name was, that had you around the neck; who was that?

A. A fellow in the barber shop; when I was in the barber shop a fellow come in and——

Q. You do not understand me. I want to know if you know who it was that had you around the neck and tried to pull you off the horse;

230 said "Damned Indians could not get any beer"; who was that?

A. I can't say what that man was.

Q. You don't know who that was?

A. No, sir; not that night.

Q. Did you know Jim Yates?
A. Yes, sir.
Q. You had seen him before then?
A. Yes, sir; but I could not tell in that night; never stopped more than just a little bit; passed right on.
Q. How far did Mish-an-a-to-ba go before he shot the pistol?
A. I could not say how long the distance.
Q. Down to that other house?
A. I never noticed; I have not been around in there much, anyway; I never go much in there noway only that night.

Cross-examination by the DISTRICT ATTORNEY:

Q. Mish-an-a-to-ba was behind you?
A. Yes, sir.
Q. When he was firing he was coming on behind?
A. Yes, sir.
Q. How far behind you?
A. I could not say.
Q. Was he as far as across the house behind you?
A. I was ahead of him.
Q. How much ahead?
A. I don't know. I heard the gun pretty close to me.
Q. You don't know what he was shooting at?
A. No, sir.
Q. Did any balls come over towards you where the people were shooting at the house?
A. I heard a gun fire.
Q. Did you hear any ball whistle by?
A. No, sir; not at me.
Q. Is Mish-an-a-to-ba here?
A. No, sir.
Q. You don't know who he was shooting at?
231 A. No, sir; I don't know. He was firing his gun; that is all I know.
Q. Is he the only one that had a pistol of your crowd?
A. It is against the law to carry them.
Q. Is he the only one that had one?
A. Yes, sir.
Q. Did Mish-ana-to-ba have one pistol or two?
A. Just one.
Q. Did he have a belt around him with cartridges in it?
A. I never noticed about that.
Q. You don't know?
A. No, sir.
Q. Where had you been? Where did you come from that night?
A. McAlester.
Q. Where were you going?
A. We were just going over to attend county court the first Monday.
Q. You went up on Chippy Hill to get some beer.
A. Yes, sir.
Q. Did you go up there to get any thing else beside beer?
A. No, sir; that is all.

Q. Didn't you go up there to see these girls?
A. No, sir.
Q. You are a married man, are you not?
A. Yes, sir.
Q. You have a wife?
A. Yes, sir.
Q. You don't do that kind of thing?
A. No, sir.
Q. You stick to the old woman?
A. Yes, sir. But my wife went to see his folks. (Laughter.)
Q. Your wife went to see her folks and you went up on to Chippy Hill?
A. Yes, sir.
Q. Jim Yates came out there, and as soon as you told him who you were he said, "You Indians can't get any beer here"?
A. Yes, sir.
Q. Did some other man come out and tell you to take your horses down and hitch them? Do you know Big George Perry?
A. I never knowed anybody in that house. I never staid in
232 that house only just a few minutes. There was a big crowd in there.
Q. Did anybody come out besides Yates?
A. Just Jim came out.
Q. Did anybody tell you to hitch your horses and come back and get beer?
A. No, sir; not that I know of.
Q. You didn't see a big fellow come out there and tell you to hitch your horses and come back?
A. No, sir. There was a big crowd in the house; that is all I saw.
Q. Nobody came out to you but one man?
A. That is all.
Q. Did Mish-an-a-to-ba get off of his horse when he was shooting?
A. I could not say. It was dark.
Q. You could not tell whether he got off his horse or not?
A. No, sir.
Q. I mean when you went on and he was shooting; did he get off his horse then?
A. No, sir; he just rode on pretty pert.
Q. Firing from his horse?
A. Yes, sir.
Q. That is all you know about it?
A. Yes, sir.
Q. Did you go back to the body that night?
A. No, sir.
Q. Did you go back to where the man lay?
A. No, sir.
Q. Did you go back there and rob his body?
A. No, sir.
Q. You didn't go back there and take the money out of his pocket?
A. No, sir.
Q. You didn't do that, did you?

A. No, sir.
Q. None of your crowd did that?
A. No, sir.

233 THOMAS WILSON, having been duly sworn upon behalf of the defense, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Question. What is your name?
Answer. Tom Wilson.
Q. Where do you live?
A. In Muskogee?
Q. Did you know the defendant Yates in his lifetime?
A. Yes, sir.
Q. How long did you know him?
A. I knew him about 12 years.
Q. You were not subpœnaed in this case?
A. No, sir.
Q. What case are you subpœnaed on?
A. On Price Hamilton's case.
Q. You knew Yates about 12 years?
A. Yes, sir.
Q. Do you know what his reputation was as to being a lawless, quarrelsome man?
The COURT. A lawless and desperate man?
Mr. FREDERICK. Yes, sir; lawless and desperate man.
A. Yes, sir; I guess it was bad. It was bad.
Q. I will ask you if you and he were friendly?
A. Yes, sir; we were good friends.

Cross-examination:

By the DISTRICT ATTORNEY. You say you guess it is bad; you can stand aside.

Redirect examination:

By Mr. FREDERICK. Do know it from how the people generally regard it?
A. I don't guess at it; I know it.

234 ROBERT MARSHAL HALL, having been duly sworn in his own behalf, was examined by Mr. C. J. Frederick, and testified as follows, to wit:

Question. What is your name?
Answer. Robert Marshall Hall.
Q. You are charged here with the killing of John Yates?
A. Yes, sir.
Q. I will get you to tell the circumstances, commencing with the evening of the killing; tell us about how you happened to go up on the hill with Jim Yates, and all about it.
A. On the evening of the third of August James Yates had come in from some kind of a trip, and he was setting around my store; he made my counter a lounging place; he would lay on the counter, and he would lay on my cot which I used as a bed back in the back off the store, and

he was talking about his trips. Previous to that time I had been with he and Bart Salmon and Dad Depew; I had been with them once or twice on trips as posse. When I started into the grocery business I knew I could not well go with the deputy marshals; I knew that the bore a bad name, and especially the Muscogee deputies, and I knew I could not be on the best of terms with the deputy marshals and the people unless I made strenuous efforts to keep in the good graces of them. And Yates he set around the store all the evening, and he wanted me to go with him on Chippy Hill, and I said, "Jim, I can't go up there; I have got no business there." He says, "That don't matter; I want you to go up there."

I said, "Why do you want me to go up there." "Well," he says,
235 "You come and go along with me anyway; you went to Krebbs with me once, and I want you as a favor to go with me up there tonight." I told him I had loaned my pistol to Bart Salmon; that I had no weapons. He said, "That doesn't make any difference; you can go along with me; I can make use of you." I said, "I have got no arms only my knife," and I reached under the head of my bed, where I had it, and he said it didn't matter, to come along anyway with him up there.

Q. Did he have any whiskey?

A. He had at that time a bottle of whiskey. He had given me a drink, and he took a drink or two of whiskey. He set there; I don't know whether he went to get any supper or not. Bill Haws was working for me at that time, and he staid there while I went to my supper, and as near as I can know Yates was left in my store spread out on my counter. When I came back from supper Yates was still in there, and pretty soon Micky Free came in and wanted me to go up there. I told Micky Free that I had no business up there, and besides, since I had gone into business there I could not afford to be dealing with deputies, because the people didn't like them, and I had to rely upon them for my support; I was in public business and I could not afford to deal with these kind of people. He said that didn't matter; he said, "You come and go along; you want to keep on the good side of these fellows; if you don't they will trump up some charge against you, and your name is mud." And he cited some case to me of some fellow that had started in some little business and incurred the ill will of the Muskogee deputies and they had preferred some charge against him of whiskey; they had gotten some one to swear against him, and they stuck the man. I was fearful of that, and I

tried my best to keep on the good side of the deputies, and
236 Yates he asked me to go again, and I told him I didn't care to go;

I had lit my lamps; it was then perhaps after 8.00 o'clock that he asked me to go the fourth time after supper. He had gone out and came back, and he had some whiskey, and I didn't think it was the proper thing for a deputy marshal to be carrying whiskey, and I didn't like the looks of that, but he seemed so presistent in his efforts to get me to go with him that finally I consented to go. I locked up my store, and on the way up there he said to me, "We will play poker." I said "No; I don't want to play any poker; I thought I came here for a different purpose."

Q. Who was it spoke about playing poker?

A. Yates said that. I replied that I didn't care to play any poker; I hadn't come prepared for it, and I didn't want to play. He said, "Come on; we will go up there anyway." I started to turn back. We were then about half way. I went on with him, and we got up there and as we were going through a strip of woods before we got to this road a fellow by the name of Crockett Lee, who was a deputy marshal of the Muscogee court, joined us. I was in my shirt sleeves and Yates was in his shirt sleeves, with his pistol buckled around him, and Micky Free, I think, was in his shirt sleeves also.

Q. Did Crockett Lee have his pistol?

A. Yes, sir; he had a pistol on also. I think he had on a coat; I am not certain. We got up there and we went to this beer joint that was kept by George Perry, and I stopped on the outside; there was some fellows on the inside that I didn't know, and I didn't care to make myself too conspicuous; I didn't know what service he wanted me to do for him—what he wanted me up there for; I supposed that he wanted me
237 there to watch some house to see if a certain whiskey peddler that he said he was trying to catch came there; probably he would wish me to spot him and go and report to him. When he spoke about a game of poker I didn't like the looks of the thing. After we got in he called for George Perry, and took him off to one side. I didn't know what he said, and he called off this woman Lulu Mays, went out and talked with her, and in a few minutes I saw a boy coming with a little round table on his shoulder, and he said, "Come on in," and I went in, and Crockett Lee set down on one corner and Micky Free was nearly opposite me and Yates was on my left, and George Perry set down and he said, "We will play poker awhile," and I said, "Jim, I don't want to play." He said, "We will play for the drinks, and then we will play for a dollar freezeout then, to make it interesting." George Perry put in a dollar, and I put up a dollar myself, and Jim Yates put up no dollar at all; he said, "You just count mine in this," pointing to his twenty-dollar gold *peice* which he laid in front of him. Yates he won everything, and he was still drinking whiskey, and drinking a great deal more than I cared to drink. I began to refuse it, and he was *presistent* in his efforts to get me to drink whiskey, and I quit the game. I got up and went out. Pretty soon Barney Dorris came hunting me up—somebody came hunting me up, and the boys were calling me to the house—and Barney Dorris found me and told me to come back, and I said, "I don't want to play," and he pulled me down, and Yates insisted on me playing again, and he seemed to be getting mad because I refused to play. I sat down and we began to play again. Some matches that we were using as counters in making change had been dropped off—had been brushed off—and probably some of the discards from some of the parties. Yates made some remark; he said, "Bet your
238 money." I said, "I bet only what I have in front of me." He said, "Go down and get it; I know you have got it; bet your money."

Q. Bet your money?

A. Yes, sir; he said, "I know you have got it; bet your money." I told him that we were playing poker and that I bet only what was in front of me. He said, "Go down and get what you have got." About that time some match's or some cards or something fell off of the table,

and I left it to him. I told him he could take the money. I stooped to pick up the matches or the discard that had fallen on the floor, and as I stooped over he pulled his pistol, and I saw that and dropped everything and reached over and grabbed the pistol, and I went over the table and he went over backwards on the floor, and as he raised up from the floor I grabbed him, and he fell out of the door, me on top of him. We struggled around there for a few minutes; every one had run out the door or had fallen out of the window of the house; has gone out some way, and we was there in the darkness, and as we fell out of the door there I still had the muzzle of the pistol, and kept it away from me. He held it this way, and I held it here, and held myself off the ground this way, and in the struggle I finally got the pistol away from him, and I said, "This is all foolishness; me in the position I occupy to be in such a fuss as this; best shut this matter right up; you can do it." He said, "I will do it," and I turned my hand loose this way, and he said, "You cut me," and I said, "I have n't done anything of the kind," and he said, "You have." I said, "I have n't; you did it when you fell out of doors on those rocks."

Q. I will ask you if you did have your knife open?

A. No, sir; I had the knife with me, but——

Q. Did you have it in your hand, is what I mean?

239 A. No, sir; I had no knife in my hand at all. He said, "You cut me, you God damned son of a bitch." I says, "Jim," I says, "I thought we have always been friends, and I am surprised at you treating me in this way," and he says, "You God damned cock-sucking son of a bitch," he said; "you are dirty; you would suck a cock as long as my arm." I said, "I may get to be very low, but I never got to be as low as that," and he said, "Yes, you will, you God damned son of a bitch," and he struck me over the head with the pistol.

Q. What was he doing at that time? Was he standing up there talking to you that way?

A. His back was against the house.

Q. Where was his pistol?

A. His pistol was in his hand, and he was cocking it and raising the hammer and waiving it in front of me, and Crockett Lee came up to him, a deputy marshal that was with him, and he said, "Don't do that; put that away," and he struck at Crockett Lee, and Crockett Lee went off to one side from him, and after Crockett Lee left there he says, "You God damned son-of-a-bitch," he says, "I have been laying for you for sometime." That is just before he struck me with the pistol. He came up then and kicked me in the side.

Q. You have not told whether he hit you or not?

A. He hit me over the head with a pistol, which stunned me.

Q. Did you fall?

A. I fell to the ground and he came up and kicked me in the side twice; I had the marks on me for many days. He fired his pistol within a few feet of me; very close to me; I had the powder burn on my neck for a long time. George Perry came up about that time and said, "Jim, don't kick him any more;" he said, "You have killed him; just let him alone; you have killed him now." And he went in the house with George Perry

and I got up and left. They were gone in the house when I got
240 up and left. I went on down to my store and I came passed the livery stable, the man had my belt and six-shooter, I had a six-shooter which I had loaned to Bart Salmon, and I went there and asked him to lend me his pistol, and he brought the pistol out to me and he said, "There is but one load in it and one that has been snapped." I got the pistol and went on down to Mr. Gleason's Kansas City chop house, and I called there for Bart, asked if Bart Salmon was there, and they told me that Bart was asleeping in the dining-room, and I went there and called to Bart and he answered me and I said, "Bart, I want your pistol." He said, "I haven't got it." I said, "I must have it," and he said, "What do you want with it," and he turned up the light; there was some blood on my arm, on my back, and he said, "My God, Marshal, have you been scrapping?" I don't remember what I said to him about scrapping. I says, "Bart, I must have your pistol; I must have it." He said it was in the front room, but I saw his pistol sticking out from under the head of the bed, and I went there and he had a pallet on the floor, and I went there and got the pistol. I had no cartridges in the pistol but the one, and I knew if he hunted me up there was nothing; he had threatened he would kill me and he had told me on the ground while I was there that he would kill me; he told me before he knocked me down he would kill me, and I went out from that ——

Q. In that connection I will ask you if you remember any conversation with Haws about the property?

A. Yes, sir.

Q. And about a power of attorney?

A. Yates had told me that he would kill me before he knocked me down, and he said that just prior to his firing a shot over me. And the man Haws was working for me, and he came down from upstairs
241 and was standing by me, and I said, "Bill, I expect I will be killed." He said, "Why, what is the matter?" I said, "My God, I will be killed before morning, and if I am you telegraph the address you will find in my drawer, and wind up my affairs here; and he says, "Come, that won't do," and I says, "I can't help it at all." I turned and walked out then, and I went up to my store and I prepared to go to bed. I washed my head; had quite a knot on it there, and I was powder burned here in my neck, and I took my clothes off there, and I found that everything that I had in my pocket and my clothes was gone.

Q. What did you have?

A. I carried a morrocco pocketbook in my hip pocket, with very valuable papers in it, bills of lad*d*ing and other receipts received there. I found I lost that.

Q. When did you have it last before that?

A. I had it when I went up there on Chippy Hill. I had it while I was up there, but it was gone when I came away.

Q. Go on.

A. That was gone, and I knew that I had something like $200.00 worth of goods in the depot at North McAlester, and I could not get them unless I had the bill of lading. I laid down and rested a while; I changed my shirt; it was covered with blood; a white shirt. I quieted myself as much as possible, and tried to sleep, and could not do it. I thought, "I

have got my business here and unless I get my goods to run it with I may as well leave; I have got to get it." Then I suppose it had been 2 hours or more had elapsed since then, since this whack of Yates on the head. And I put on my clothes agaon, I put on a clean shirt, and I put on Bart Salmon's pistol, and the one I had got from the livery man, and I put on my coat—I put on no vest, it was pretty cool then at that time in the night, and I went on up there; and as I got to the first house coming from the south a woman by the name of Luly Mays, I believe,
242 and Jesse Trout—there was a women in the house at that time named Jesse Trout. She had been up to the house where this affray with Yates and myself had occurred, and I knocked at the door, called Lou, and I heard this woman's voice, and she said, "Lou isn't here;" and I said, "Jesse, come to the door;" and Jesse, said, "Is that you, Marshal;" and I said, "Yes;" and I said, "Jesse go up to this house here, George Perry's saloon, and find my pocketbook." She said, "No, I don't want to; I have gone to bed." She said, "Go up there yourself." I said, "I don't want to go up there; it is probable Yates is up there, and I will have some other difficulty with him, and I don't want to have any more trouble with him again for he will kill me;" and she said, "You need not be afraid; he is gone; I saw him ride towards Krebb's, and he has been gone sometime;" and I started off, and took a few steps, and about that time I heard some shooting off to the right; I was facing the north; at that time I heard some shooting and I stopped.

Q. Where would that place it with regard to those Indians, then?

A. I didn't know there was any Indians there then.

(Witness is handed map, and locates on it where he was situated and where he heard the shooting.)

Q. Jesse had told you that Yates had gone?

A. Yes, sir. At that time I was standing only a few yards from this house, and I saw something come stooping across right in here, and I saw a flash from it. The first thing that sprung into my mind when I saw this object was that it was a stray cow or a mule; it was in a stooping position; I didn't take any notice of it until it was pretty close to me, and then there was a flash, and I knew that a stray cow or a mule didn't carry such a flash as that, and by that I put my hand on my pistol, and as I did that I
243 was shot in the right arm.

Q. Can you show the wound in your arm?

(Witness here takes his coat from his arm and shows wound to jury.)

Q. What shot was that?

A. When I received that shot that was the second shot from that object. The first shot almost blinded me; it surprised me; I wasn't expecting anything of the kind. The second shot struck me in the arm. It deadened this arm for a minute, and the next shot that was fired at me, the third shot, I pulled both pistols—I had one on each side—and I returned the fire as quick as I could. For the first or second shot the smoke was so heavy I could not see anything.

Q. Did you hear any balls whistleing by you?

A. I don't remember about any balls, whether I heard any whistling or not. There was a continuous firing then for—I don't know how long it lasted.

Q. It appeared to be Yates; I will ask you if he came any closer to you?

A. He kept coming towards me.

Q. What did you do; did you stand still?

A. I stood still there; probably I took a few steps towards him. When the firing commenced I knew it was Yates. I was at a disadvantage, because he was a crack shot with a pistol or revolver, and I was very poor. He begin the firing, and I probably took one or two steps forward, maybe more; I know I went forward. I was excited at the time and badly rattled, and I began firing with both pistols as fast as I could until the firing from him stopped. There was some rocks back of where this party was, and I supposed that he had emptied his pistol and had gotten back of these rocks like to load it, and I had stopped firing and stood there until the smoke cleared away, and I saw an object laying by the side of the road.

Q. About what distance from you?

244 A. I suppose it was about as far as from me to that water-cooler over there [indicating about 30 feet].

Q. What did you do?

A. As soon as I saw that body in the road I was rattled, and I went right across to Ada's house; I knew I was shot in the arm, I could feel the blood running down pretty freely, and I knew I needed some assistance pretty quick; I wanted to get her to bandage the wound up, and I went over, and they told me something, some answer came from in, I don't know what it was, and I told them to open the door, that I was wounded, and then they opened the door. I asked them to strike a light, that I was wounded, I wanted to see how bad I was hurt, and they struck a light, and then I pulled off my coat, and I saw that the bullet had lodged in the muscle of the right arm up here, and I asked Ada if she would cut the ball out, and she said, "No; she could not do it." I asked her to get a knife or something and cut it out, and she said she could not do it. And she didn't do anything, but jump up and down and cry, and I asked her to give me some money; I told her that I had no money; that I had to leave the country; I said, "I can't stay here." She said, "There is no need for you to leave at all." She says, "Jim Yates was looking for you only a few minutes ago, only a short while ago; there is no need for you to leave here at all. He was hunting you, swearing he was going to kill you." I told her I could not stand anything like that at all, and she gave me a dollar and a half, and I asked her to give me some bread, probably I would have to go to the bush's or rocks somewhere, and if I did I would need something to eat. I walked on on the road towards McAlester, North McAlester, and just before I got over the raise of the ground where Bil Smith lived I met George Perry and

245 Bill Smith; I didn't know who they were, it was about half past two in the morning, and I threw my pistols on them.

Q. You mean you didn't recognize them?

A. No, sir; I didn't recognize them at all. I said, "Who is that?" And George Perry answered and said, "It is George Perry," and I said, "Who is the other man?" and he said, "It is Bill Smith." I said, "All right; I have got a ball in my arm, and I want you to cut it out," and he said, "Come over into Bill Smith's house," and I went in there, and Bill

Smith he sharpened up a pocket knife, and George Perry held my arm and Bill Smith cut it out. I said, "George, can you give me some money?" And he said, "I haven't got any," and I said, "Give me some money, and I will give you an order on my store for it." I asked Bill Smith if he would give me any money, and he said, "I haven't got any money." He gave me no money. I asked him to give me some bread and a vest; I had no vest on.

Q. Did you get any money at Smith's?

A. Yes, sir; George Perry gave me a dollar there. Bill Smith gave me a vest. I then went on up to Old McAlester and got on the train and road a ways, and got put off, and then I caught a freight train, and in the course of a few days I got to my old home.

Q. I will ask you if you had any vest at your store?

A. Yes, sir; I had a vest there.

Q. You say you had no money; did you have any money at the store?

A. Yes, sir; I had money at the store; I had something near $40.00 or $50.00 in the store.

Q. You went back up to Chippy Hill to hunt for your pocket-book and papers?

A. Yes, sir; I wanted to get the papers I had lost. The depot agent had refused to give me any goods once unless I presented the bill of lading.

Q. You had to go to Old McAlester for your goods?

A. Yes, sir.

246 Q. There is no M., K. & T. R. R. depot at South McAlester?

A. No, sir.

Q. You had to go to Old McAlester to get your goods?

A. Yes, sir.

Q. Then you got on the train at Old McAlester, you say?

A. Yes, sir.

Q. Where did you go then?

A. I went until they put me off.

Q. Where did you first stop?

A. Somewhere up above Muskogee. I don't know what the place was.

Q. Go on and tell us briefly where you went to.

A. I beat my way on freight trains until I got to Memphis, about four or five days afterwards.

Q. What did you do there?

A. I staid there with my aunt until my arm began to get well so I could use it.

Q. Then where did you go?

A. I went to Mississippi.

Q. What point?

A. On my father's place, about 40 miles above Yazoo City.

Q. How long after this transaction until you got to your father's?

A. Probably it was about 40 days; 30 or 40 days.

Q. Did you communicate with your father about that trouble?

A. Yes, sir; I had written him.

Q. Then he had been out to South McAlester to look after the business before you got home?

A. Yes, sir; that is what I learned afterwards.

Q. You went home, then; where did you go from there?
A. I went down to Jackson, Mississippi.
Q. What were you doing in Jackson?
A. I was there staying with a cousin of mine, waiting there until the February term of court convened at Yazoo City; I wanted to go up there and stand trial.
Q. When was it you were arrested in Jackson, Mississippi?
247 A. Last September.
Q. The September after the killing up here in August?
Q. Yes, sir.
Q. The next September?
A. Yes, sir.
Q. You say you wanted to stay there until the February term of court convened at Yazoo City?
A. Yes, sir.
Q. Then you were going to stand your trial for what?
A. Killing a man there; a nigger.
Q. You were indicted for killing a negro?
A. Yes, sir.
Q. Did you attend that term of court?
A. I was arrested and afterwards attended the term of court.
Q. Did you have a trial?
A. Yes, sir.
Q. What was the result of it?
A. I was acquitted.
Q. When was it that nigger was killed?
A. It was in August of 1889.
Q. Two years before this?
A. Yes, sir.
Q. I will ask you why it was you went away from there? Why not stand trial at once?
A. Under the excitement my father didn't know what the matter was, and he said "You must get out of here," and so I went four or five miles in the woods, and I staid until night. I knew there was no use of it; it was a case of self-defense altogether, and I went back into Yazoo City that night, and a squad of negroes waylaid me and shot at me, and at that time my father thought it was best I would go away from there for a while, and when I came out into the Territory I saw that South McAlester was going to be a good town, I thought, and I wrote my father that with a little stock of goods I could do well there, and he wrote me that if there was good prospects he would send it to me, and he says, "You will
248 have to make it a success; if you don't you won't have any money for the trial at home."
Q. Where did he live?
A. At Yazoo City, Mississippi?
Q. How old are you now?
A. I am 23 years old.
Q. That occurrence happened in 1889?
A. Yes, sir.
Q. You were about 20 then, I reckon?
A. Yes, sir; 20 years old.

Q, Your father sent you away?
A. Yes, sir.
Q. You located at South McAlester?
A. The Choctaw road was being put through there, and I had heard it was a good business point to locate, and I wrote this news to my father, and he sent me about $300.00 worth of goods there.
Q. You gave your name as Robert Marshal?
A. Yes, sir.
Q. You left the Hall out when you were at McAlester?
A. Yes, sir.
Q. You may tell why you did that.
A. That was my middle name.
Q. Why did you not go by your full name?
A. I did that for the purpose of avoiding detection.
Q. You didn't want to be arrested?
A. No, sir; not until I had money to pay lawyers for defending me, and that was my only reason.
Q. Were you acting under the advice of your father about this?
A. Yes, sir.
Q. You were a single man, not married?
A. Yes, sir.
Q. Your father sent you some three hundred dollars' worth of goods?
A. Yes, sir.
Q. Where has you been before that, in the time following that?
A. I had been in Memphis; I had run a commissary's store on the Iron Mountain Railroad, worked for a man in Charleston and Argenta, and I had kept books in the Pulaski County works in this State. That is about all that I have did.

249 Q. Where did you go from to South McAlester?
A. From the Pulaski County works.

Q. You went over to South McAlester?
A. Yes, sir; I staid in Fort Smith about a week. I was sick at the time when I was here.
Q. Have you ever had any trouble except this before, the trouble you had in Mississippi and this one?
A. No, sir.
Q. Were you ever arrested at all for anything before?
A. I was arrested once for drinking.
Q. Where was that?
A. It was in Jackson, Mississippi.
Q. How did you happen to be arrested for that? Were you drunk, carousing around?
A. No, sir; I met a man there who I had known in Arkansas, and I hadn't drank any for a good while. I believed that was the last whiskey I had with Yates. That is one reason I wanted to go to the Territory; I heard they had no whiskey there, and I thought I would meet with people who would be strict prohibitionists and I would keep away from it. I was drinking there, and I think that some barkeeper or somebody put an opiate or something in it; anyway it got away with me. I set down in a chair and went to sleep and was arrested.
Q. Being arrested for that thing you were held?

A. Yes, sir.

Q. How far is Jackson, Miss., from Yazoo City, Miss.?

A. It is 44 or 45 miles.

Q. Jackson is in Hines County?

A. Yes, sir.

Q. Does Hines County touch Yazoo County?

A. I think so; I can not swear to that. I am not certain about the location of the counties.

Q. When were you brought to Fort Smith?

A. The 6th of March.

Q. You have been here since then?

A. Yes, sir.

Q. You have been in custody since last September?

250 Yes, sir; nearly 11 months.

Q. Is your mother living?

A. No, sir; she is dead; she has been dead several years.

Q. How about that knife that is spoken about; where did you get that?

A. It was given to me by the superintendent of those works; it was made in a blacksmith shop there.

Q. Down in Pulaski County?

A. Yes, sir. That is how I came with the six-shooter, too.

Q. You carried that with you to South McAlester?

A. Yes, sir; I had no means of disposing of it.

Q. Had you ever carried that knife as a weapon?

A. That is the first time I had carried it. I wouldn't have carried it then——

Q. You say you kept it under your pillow?

A. Yes, sir; I left it in my room.

Q. Your pistol you had loaned out?

A. Yes, sir; I had no further use for it; I loaned it to Bart Salmon.

Q. Yates knew you had that knife?

A. Yes, sir; he was in the room at the time, and he kept asking me to go with him, and I told him I had no weapons, no pistol, was one reason I didn't want to go. I told him I had a knife; I would carry that along.

Q. I believe you told us a while ago the talk you had with Bart Salmon about the pistol. You say you told Haws that Yates was going to kill you; you looked to be killed; expected to be killed?

A. Yes, sir.

Q. You will remember that Bart Salmon and Depew said that you said that the man had called you a son-of-a-bitch, and you were going to kill him, and the next day they could find who it was?

A. They misconstrued my words. I said that he called me a

251 son-of-a-bitch and said he would kill me before morning.

Q. That is what you said?

A. Yes, sir. They have misconstrued my words; that is al. I expected probably that he would.

Q. After you went there to your store and was taking off your clothes, putting on other clothes, I believe you say you laid down a while?

A. Yes, sir.

Q. When was it you discovered you had lost your pocket-book?

A. When I was changing my clothes.

Q. You have already told us you had it in your hip pocket when you went up there that night. You had an idea about where you had lost it, I suppose?

A. I had an idea I had lost it along that road.

Q. Where did you expect you would find it?

A. I thought I would find it where Yates and I had been scuffling, on the ground.

Q. About what time was it, do you think, you went back up there?

A. It was something near 3:00 o'clock. I know that passenger train passes north about half-past three, and it was only about half an hour after Bill Smith cut the bullet out of my arm before I got on the blind baggage.

Q. About how long after Yates had knocked you down, kicked you there, until you had gone back?

A. It was about 2 hours or more.

Q. Then you remained at your store quite a while?

A. Yes, sir.

Q. You say when you went back up there you went back to look for your papers?

A. Yes, sir.

Q. Did you go back up there to hunt Yates.

A. No, sir; I did not want to have anything to do with him. I had already received enough of Yates.

252 Q. It may be pertinent to ask you why you carried these pistols?

A. I didn't know what might happen to me; I didn't expect he would stay in one place until three or four o'clock in the morning.

Q. You say that after Yates fell and the smoke cleared up you saw an object laying in the road—laying on the ground; you did not know at that time who it was for certain, did you?

A. No, sir.

Q. You didn't know whether he was killed or not; you thought that he was behind the rocks loading his pistol. Did you go any nearer to him than where you were when he was shot down?

A. No, sir; I went directly west to Ada's house.

Q. You didn't go near him?

A. No, sir.

Q. You have heard some of the witnesses say that his pockets were turned wrong side out, and if he had any money 'twas taken?

A. Yes, sir; I heard that.

Q. You didn't go any nearer than you were when you got through shooting?

A. No, sir.

Q. You went straight to Ada's?

A. Yes, sir.

Q. From there you went to Smith's?

A. Yes, sir.

Q. From Smith's where did you go?

A. I went to Old McAlester.

Q. How long did you remain at Old McAlester?

A. I guess I was there about 20 minutes before the train came.

Q. Did you go back down there any more?
A. No, sir.
Q. Have you been back since?
A. No, sir.
Q. Did you know anything about what kind of a man Yates was before then?
A. I had heard that he was a bad man. From reputation I had heard that he had been to the penitentiary a couple of times. I didn't think it was right to avoid a man because he had once been in trouble.
253 Q. Did you know that Yates was going to give you any trouble?
A. I hadn't the least idea in the world.
Q. Had he had any trouble with you before?
A. No, sir.
Q. You didn't know that he had any enmity against you?
A. No, sir; I thought he had every reason to be friendly with me.
Q. He had been to your store a good deal?
A. I had loaned him money two or three times, loaned him money to bury his wife with when she died.
Q. And you had no reason to expect any harm from him?
A. The last place in the world.
Q. I will ask you if you made a practice of gambling, playing poker?
A. I did not.
Q. One of the witnesses said he had seen you coming from Old McAlester where you had been playing a game up there; I will ask you if you had played any game up there?
A. I don't think I ever played up there at all; I had often been to McAlester; I had to go up there to see about goods. I would often walk up the railroad about a mile or a little more, and that may account for the reason of him seeing me come from McAlester.
Q. Had you ever played cards or gambled with Yates before?
A. No, sir.
Q. Had you ever been present while he was playing a game?
A. No, sir.
Q. Had you ever played with him for fun?
A. I have played euchre on my counter, with a small toy deck of cards, for fun.
Q. Do you know whether he was regarded as a gambler?
A. I never made any inquiry.
Q. You had heard nothing in that respect?
A. No, sir.
254 Q. Had you seen him with whiskey before then?
A. Yes, sir; he brought whiskey in there repeatedly; would give me a drink.
Q. Was he a man that got intoxicated often?
A. He seemed to be pretty full; I had never seen him reeling around any; in the gutters, or anything like that. I had seen him under the influence of liquor.
Q. Did you know who this man Micky Free was?
A. I had heard that he was a blackleg.
Q. You would not have gone up there with him alone, then?
A. No, sir.

Q. You went with Yates?
A. Yes, sir; I went with Yates.
Q. Did you go up there with the understanding you were going to play poker?
A. He didn't tell me anything about it until nearly there.
Q. When you went you didn't know why they wanted you to go up there at all?
A. No, sir; I supposed they wanted me to go there to watch somebody, some of the houses for a whiskey peddler, or something of the kind.
Q. Had you been up there with him before?
A. I had went once with him to Krebs; and then one night with Bart Salmon and Williams up on Chippy Hill to see about some people that turned out to be officers.
Q. These are the trips you made with these people?
A. Yes, sir.
Q. You knew these women up there?
A. They often bought goods in my establishment.
Q. One of them says she had borrowed a dollar and a half from you?
A. Yes, sir; she did that.
Q. That evening she borrowed a dollar and a half?
A. I think so; I am not certain; I know she had borrowed a dollar and a half.
255 Q. Had you been up there that evening?
A. I don't remember.
Q. Now, remember, if you can. She says she borrowed a dollar and a-half from you that evening?
A. Probably so.
The DISTRICT ATTORNEY. Went up there to sell goods, probably.
Mr. FREDERICK. Had you gone up there to sell goods?
A. No, sir; I didn't go up there to sell any goods.
Q. Had you gone up there to deal with these women?
A. No, sir; my trips up there had been always purely business; I don't think I had ever gone there before that but that I went as a posse or as assistant of one of these deputies.

Cross-examination by the DISTRICT ATTORNEY:

Q. You were arrested in Mississippi, you say?
A. Yes, sir.
Q. How old were you when you killed that nigger?
A. 20 years old.
Q. You killed him?
A. Yes, sir.
Q. In the State of Mississippi?
A. Yes, sir.
Q. And left to avoid a trial for killing a negro in Mississippi?
A. Not to avoid a trial.
Q. What did you leave for?
A. Because my father told me to go.
Q. You were not afraid to be tried for killing a negro in Mississippi?
A. No, sir.
Q. These negroes that assaulted you and shot you down; were they ever convicted?

A. They have never been captured.
Q. It wouldn't take long to convict them if they were caught, would it?
A. I don't know.
Q. You left Mississippi and went over to Little Rock?
A. No, sir.
256 Q. Where did you go?
A. I went to Memphis.
Q. How long did you stay there?
A. I was there about six months.
Q. From Memphis where?
A. Little Rock.
Q. What did you do in Little Rock?
A. I went to work for the Pulaski County Works.
Q. That is guarding the penitentiary convicts where they are working?
A. No, sir; I kept books for them.
Q. You guarded the county prisoners, didn't you?
A. About one month I did.
Q. You bought a pistol to guard the county prisoners with?
A. Yes, sir.
Q. They did not have their own pistols to give to men who did guard duty?
A. Sometimes they did.
Q. Did they not always?
A. No, sir.
Q. You bought one?
A. Yes, sir.
Q. What was it you shot the negro with in Mississippi?
A. With a pistol.
Q. What did you do with the pistol?
A. I sold it?
Q. Where did you sell it?
A. At Memphis; I sold it before I got to Little Rock.
Q. From Little Rock you came to Fort Smith, and staid here a little while?
A. I was here about a week.
Q. What name did you go by in Little Rock?
A. Robert Marshal.
Q. Did your father advise you to change your name?
A. Yes, sir.
Q. So you went into the Indian country and lived under an assumed name, a name that wasn't your father's?
A. I think it is mine.
Q. You think that "Hall" is your name, do you?
A. Yes, sir.
Q. Well, then, Mr. Hall, your name is not Marshal?
A. Yes, sir.
257 Q. You lived under an assumed name; you went there as Mr. Hall when your name was Marshal?
A. No, sir.
Q. You didn't?
A. No, sir; I went there as Marshal.

Q. You corrected me; you are right. You went under the name of Marshal when your name is Hall?

A. Yes, sir.

Q. You did that to keep from being arrested? You did that because you were charged in the country that you left with the crime of murder, didn't you?

A. Yes, sir.

Q. What age was you when you killed Yates? You are now about 23?

A. I was about 22.

Q. Two years had elapsed after killing the nigger before you killed Yates?

A. Yes, sir.

Q. When you were at the age of 22 you had two men's lives on your hands? You had killed two men, hadn't you?

A. Yes, sir.

Q. When you did this killing you fled; what did you run for?

A. I had received such treatment from Yates, being a stranger there——

Q. Yates was dead?

Mr. FREDERICK. Let him finish his answer.

The DISTRICT ATTORNEY. Why did you flee the second time? You fled from the country first on your father's advice?

A. Under the excitement of the moment I did'nt know what to do.

Q. So you run; instead of facing a killing that you did in your self-defense you run; you left the country, did you?

A. Yes, sir.

Q. Fled?

A. Yes, sir.

Q. Can you give any reason for fleeing, and leaving your property, and everthing behind, only from the excitement of the moment?

A. That is all.

258 Q. You went to Bill Smith's and got the ball cut out of your arm?

A. Yes, sir.

Q. From there you went to Old McAlester and staied there 20 minutes; where did you stay during the 20 minutes?

A. On the railroad track.

Q. How far from the town?

A. I was in the town.

Q. You come to the depot?

A. I did.

Q. I thought you said you staid on the railroad track?

A. I staid on the right of way.

Q. Did you go to the depot?

A. Yes, sir.

Q. Did you buy a ticket?

A. No, sir.

Q. Did you get on a freight train there?

A. No, sir.

Q. Passenger?

A. Yes, sir.

Q. When you got onto the car did you go into the car?

A. No, sir.
Q. You staid out on the platform, did you?
A. Yes, sir.
Q. Did you get on top of the car?
A. I got in front.
Q. On the front of the platform?
A. Yes, sir.
Q. And you remained there until the conductor put you off?
A. Yes, sir.
Q. Then you had a few dollars, why didn't you buy a ticket from there?
A. I didn't know but what I would need that for more important purposes.
Q. Than what? You had some bread with you?
A. I probably had.
Q. Didn't you get some bread from Mr. Smith?
A. I hardly know what became of it.
Q. You got some?
A. I really don't remember whether I did or not.
Q. You asked him for bread?
A. If I did get it I lost it.
Q. You asked him for bread?
A. Yes, sir.
259 Q. Why is it you forget whether he gave it to you or not? You ought to be able to tell me that, whether he gave you any bread or not? You ought to be able to tell me about it?
A. There was his wife there and there was others, and I think he told his wife to give me bread or something of the kind, and my coat was off, and I think he told her to put it in there; if she did it was lost afterwards; I know I didn't find it.
Q. Your coat was off?
A. Yes, sir; when *hte* shot was cut out.
Q. You went up with your coat on to that place, did you;
A. Yes, sir.
Q. Then you think you got the bread. What did you want with the bread?
A. I didn't know what I wanted with it.
Q. You have said to Mr. Frederick that you thought you would have to go to the woods?
A. Yes, sir; I thought so.
Q. Why go to the woods?
A. I didn't know what to do.
Q. Why not go to McAlister and tell the people what you had done? You went down there to get a pistol; why not go back there and tell the people?
A. I didn't know what to do. That is the way of it.
Q. What was the trouble?
A. I suppose under the excitement of the moment I didn't know just what to do. I have many a time rued that I didn't.
Q. You didn't run that way when you killed the negro? You didn't run until your father told you to; you killed him in self-defense. Why were you so excited when you killed Yates?

A. My goodness alive, I don't know.

Q. At any rate, you thought you would have to go to the brush. Did you beat your way on the railroad until you got to Memphis?

A. Yes, sir.

260 Q. How much money did you have when you got to Memphis?

A. About $2.00.

Q. What did you do with the balance of the money?

A. I eat some, and I bought some stuff for my arm.

Q. You beat your way to your relatives; you found some relatives there?

A. Yes, sir.

Q. Remained how long?

A. Was there probably a week or ten days.

Q. From there you went to your father's?

A. Yes, sir.

Q. Go to your father's house in the night time?

A. I didn't go to my father's house at all.

Q. Why? You were not afraid of the negroes, were you? Your father advised you to leave there; why not go to his house?

A. It was in Yazoo City where I killed the negro, and I wanted to wait until the February term of court to stand trial.

Q. It was there you killed the negro?

A. Yes, sir.

Q. Why didn't you go there?

A. Why, I didn't want to go there and probably lay in jail until the February term of court.

Q. You were still avoiding arrest, were you?

A. Yes, sir.

Q. When you went back home you took your own name again?

A. Yes, sir.

A. In the Indian country you were Mr. Marshall, and at home you were Mr. Hall?

A. People frequently called me Hall in South McAlester. I never denied it.

Q. They called you Hall before that?

A. Yes, sir.

Q. How come them to call you Hall? How did they find out your name?

A. The name of the firm was Hall & Co.

Q. Who was Hall?

A. I was.

Q. Who was the company?

A. I was.

261 Q. That was a good firm.

A. Yes, sir. I was Hall and my father was Hall, too.

Q. You say you were the company and you were Hall.

A. We were both Halls.

Q. Why didn't you call the firm Hall & Son? That would give your name, would it not?

A. Yes, sir; some. I never denied my name before, though.

Q. That is your trip; I have just followed you around now, passing over the killing; I haven't asked you anything about that. Where did you say you got the knife?

A. I got it at Pulaski County works.

Q. What did you want with the knife?

A. The knife was given to me.

Q. You didn't buy the knife at South McAlester?

A. No, sir.

Q. You swear you didn't?

A. I never bought the knife at South McAlester.

Q. It hadn't been seen in the store in South McAlester?

A. Probably a good many people had seen the knife there.

Q. What did you want of a knife of that kind?

A. I had the knife just like the pistol; it was just on my hands and wanted to get rid of it.

Q. Who was it taught you to carry your knife in your bootleg?

A. I suppose Yates; he suggested it to me. I told him I had no way of carrying it.

Q. I suppose Yates told you how to carry your pistol, too, did he not?

A. No, sir.

Q. What did you want to take the knife for?

A. I didn't know what I would want with it?

Q. You and Yates had always been friends?

262 A. I didn't expect to use any knife on Yates, anything of the kind, or anybody.

Q. You carried the knife in your shoe?

A. Yes, sir.

Q. Why didn't you put it in your pocket, put the scabbard in your pocket?

A. I didn't want the people to see it.

Q. You wanted it to be covered up with your pants?

A. Yes, sir.

Q. That is the way they carry them in Mississippi, is it?

A. I nev'r seen them carried that way.

Q. It was a pretty big knife, was it not?

A. About 3-inches and-a-half blade.

Q. Nice, good, clean blade?

A. Yes, sir.

Q. Wasn't dull?

A. No, sir.

Q. After the killing of Yates you went down to South McAlester. You say you went upstairs after you got that pistol from Bart Salmon and staid there an hour?

A. No, sir.

Q. Did you say you went up there and staid there any time?

A. I didn't say I went upstairs at all.

Q. You didn't go up stairs?

A. I don't say that I did.

Q. Did you?

A. I thin' I did.

Q. You think you went up stairs?

A. Yes, sir.
Q. How long did you stay there?
A. I was up there in the house about 12 or 15 minutes.
Q. Where did you take your clothes off?
A. In my store.
Q. You went to your store?
A. Yes, sir.
Q. You staid there how long?
A. Probab'y an hour.
Q. Nobody, I suppose, saw you?
A. I don't know.
Q. When did you learn to use pistols with both hands?
A. That night.

Q. You only had one pistol when you killed the darky?
263 A. That is all.

Q. Solomon's pistol was a left-handed pistol, was it not?
A. I don't know, sir.
Q. Left-handed scabbard, I mean?
A. Yes, sir; he had a left-handed scabbard.
Q. You know that?
A. I knew it was a left-handed scabbard.
Q. You had been with him?
A. Yes, sir.

Q. You deny what these people said you said down there, about you would kill that man before morning; that he had hit you over the head with a pistol, and called you a son of a bitch, and when they asked you who his name was you told them they would find him dead in the morning, and they would know what his name was then. You deny making that statement?

A. Yes, sir; they misconstrued my words; that is all.

Q. When you went up to Chippy Hill you went over to this house of prostitution. Did you get into the game of cards, or was it while the game of cards was going on that you went over there?

A. I think that Yates and I went over there first.
Q. What did you and Yates go over there for?

A. I didn't know what he wanted of me at all. I was simply subject to his orders for the time being.

Q. You went up there to spot somebody?
A. I supposed so.

Q. After you got into business and was afraid of making yourself unpopular by going with deputy marshals you went up there and went for the purpose of spotting somebody. You were not afraid of becoming unpopular by going to these whorehouses to spot somebody?

A. I told Jim I didn't want to go.
264 Q. But you went, although you were afraid of becoming unpopular. You went with this deputy marshal?
A. Yes, sir.

A. Yes, sir.

Q. You have said that the McAlester deputies are a great deal worse than the others are?

A. Yes, sir; I regard them as such.

Q. Why did you go with them?

A. I didn't think I could hardly get around it.

Q. You could not get around going with bad men?

A. Probably, I could have gotten around going with him that night but I didn't want to incur his illwill.

Q. When you were playing cards you deny that you held six cards in your hand?

A. I don't think there was six cards in my hand ever when I was playing.

Q. Do you deny playing 6 cards on him?

A. Yes, sir.

Q. You heard Micky Free and Perry both swear that you had six cards in your hand?

A. Yes, sir.

Q. And that you were reaching under the table, that you dropped one leaving yourself but five?

A. Yes, sir; I heard that.

Q. That is regarded in a poker game as a fraud, as a cheat?

A. Yes, sir.

Q. You deny what these two witnesses have said?

A. I didn't drop a card; what was dropped was some matches that was dropped on the floor under the table. Besides, when I stooped down I told him to take the money.

Q. Did you tell these people down there that if you had gotten your knife out you would have killed him?

A. No, sir; I do not remember of saying anything of the kind.

Q. Do you deny it?

A. I don't remember it. I was very much excited at the time.

Q. Now, you say you went down to South McAlester to get these pistols; that you went to look for the pocketbook?

A. Yes, sir.

265 Q. Did you ever find it?

A. No, sir.

Q. When you were getting these pistols you hadn't discovered your pocketbook was gone, had you?

A. No; I hadn't.

Q. What did you get the pistols for then? You were not going back there anymore?

A. I didn't know what time I would need them.

Q. What place did you get your pistol, the first one you had there?

A. The livery stable.

Q. You went to the livery stable and got that?

A. Yes, sir.

Q. That was before you went over to the other place?

A. Yes, sir.

Q. You then went on up there and when you got to Lulu's you say you saw somebody crouching along and you took it to be a cow?

A. No, sir; not at first.

Q. What was it you said? You stopped at Lulu's, and you came out, and started up the road, and saw something, some object you took to be a cow?

A. Yes, sir; at first.

Q. How far did that crouching object come towards you?

A. It came about 25 or 30 steps.

Q. Before there was a shot fired?

A. Yes, sir.

Q. You still thought it was a cow?

A. Not when the shot fired, I didn't.

Q. You thought so until it flashed?

A. Yes, sir.

Q. You knew that a cow could not flash?

A. Yes, sir.

Q. 25 or 30 yards it came towards you?

A. I think it was about that.

Q. Was there any shooting going on at that time anywhere?

A. I heard some shooting just before I got to that house.

Q. It is not true, then, as stated by Perry, that you and the
266 deceased were firing at each other up to the second shot, and these Indians were firing up to that time? It is not true?

A. I did not understand——

Q. When you heard these shots before you got to the house, and that object came crouching up towards you 30 or 40 yards, after you came out of the house, there was no shooting until you saw that flash; is that true?

A. There was shooting just before.

Q. Before you went in the house?

A. I didn't go in the house.

Q. Before you went to the house?

A. Before I got to the house.

Q. Then you went to the house and had a little talk?

A. Yes, sir.

Q. How long did you stay there?

A. I suppose I was there about three minutes.

Q. Then how far did you go from the house?

A. I took probably fifteen steps.

Q. And this crouching object came 30 steps?

A. Yes, sir.

Q. How did it come further towards you than you did towards it?

A. Because it was about 75 or 80 yards from me at the time.

Q. You went about fifteen steps while it was going 30?

A. Yes, sir.

Q. How is that?

A. I saw it and didn't know what it was, and I didn't want to go up towards the house.

Q. So you went slow, did you?

A. I was walking along right in the middle of the road.

Q. This crouching object went 30 yards while you were going 15?

A. I suppose it went about that distance.

Q. It must have gone about twice as fast as you did. Was there anybody with the crouching object?

A. I didn't see but the one.

Q. You went to the house and had a little talk, and you went 15
267 steps and the crouching object came up towards you, and while there was no firing it flashed right up in your face; how close was it to you when the firing occurred?

A. It probably was about 50 or 65 yards apart.

Q. Up to that time from the time you had heard the shots before you got to the house, up to that time that flashed you heard no shots?

A. No, sir.

Q. That flashed, and then you drew your pistol, and just at that time you got the shot in the arm, and the third shot fired and you returned the shot, did you?

A. Yes, sir.

Q. You walked up towards him?

A. Yes, sir.

Q. You advanced two or three steps?

A. Yes, sir; I think so.

Q. The object came towards you while firing?

A. It didn't come directly towards me; when the firing commenced it was going in a westerly direction.

Q. The second shot struck you, and the third shot was fired before he got into the road?

A. Yes, sir.

Q. How far was the crouching object from you when it fired the first shot?

A. I suppose it was about 50, or between 50 and 60 yards apart.

Q. How far from the road?

A. I suppose about 20 steps or 30 steps, nearer 30 than 20, I think.

Q. When the firing commenced?

A. Yes, sir.

Q. And then it fired the third shot when it was in the road?

A. Yes, sir.

Q. He had walked 30 steps from the time that he fired the first shot?

A. Yes, sir.

Q. You walked about two from that time that he fired the first shot; you never did advance but two or three steps?

A. Yes, sir.

268 Q. How close were you when he fell?

A. I suppose about as far as from here to the water-cooler there (about 50 feet).

Q. He was doing the advancing then, and not you. He advanced then that distance of 60 yards from the time that he commenced shooting?

A. The road runs north and south; he wasn't in the road during all this time.

Q. He went across 30 steps to the road, and then came down towards you?

A. He came to the road, and fired as he came to the road; when he came to the road he came down the road firing at me.

Q. Did anybody fire except you and he?

A. That is all I heard.

Q. Then it is not true that during the time that you and he were first shooting there was Indians firing clear up to the last shots?

A. I could not tell about that; I had my hands full?

Q. You could tell whether the Indians were firing right along there?

A. I had my attention turned over to this party that was firing at me.

Q. But you could tell whether there was any shooting right at the time that he commenced firing at you or immediately before?

A. I don't remember of hearing it.

Q. The way you put it there was nobody but you and he fighting?

Mr. FREDERICK. He didn't say that.

The DISTRICT ATTORNEY. He said there was no other shots fired.

The WITNESS. I didn't hear it.

Q. You would have heard shots fired up to the time that you commenced anyhow. It would have attracted your attention if there had been firing going on at the time that this man fired at you first, you would have known it?

269 A. I saw a flash a few minutes before that——

Q. You have told what you did; that after you went to the house you had this talk with this woman, and after that you walked out fifteen feet from the house; you walked slowly this 15 feet, as the crouching object you saw come in had gotten 30 yards, had moved along that far since the first shot was fired; that is what you have said; I had you to state it in that way——

A. If there was any other shots fired at the time that Yates and I were firing, or this party was firing, I could not have heard it.

Q. You didn't go up to him?

A. No, sir.

Q. You are not the man who robbed the body?

A. No, sir.

Q. You are not the man who took the pistol away?

A. No, sir.

Q. Get his pistol and take the cartridges out of his belt?

'. No, s'r.

Q. You didn't do anything of that kind, did you?

A. No, sir.

Q. But you went over to this other house of prostitution at once, didn't you?

A. Yes, sir.

Q. You say you never found your pocketbook?

A. No, sir.

Q. Nobody has ever seen it?

A. No, sir; not that I know of.

Q. Did you say anything about having lost your pocket to anybody that night?

A. I said something about it at Bill Smith's.

Q. How many shots did you fire?

A. I don't know how many.

Q. You fired with both hands; you had two pistols; were they self-cockers?

A. No, sir.

Q. How did you manage to cock them?

A. With my thumbs.
Q. Would you cock them without laying the pistols down?
A. Yes, sir; throw them up this way.
Q. Throw them up and cock and fire them both together?
A. Yes, sir.

Q. You would fire them, throw them back and cock them, and
270 fire them again?

A. Yes, sir.
Q. How many shots were left in your pistol?
A. I didn't count them.
Q. Were there any?
A. Yes, sir.
Q. How many?
A. I don't know.
Q. You can give no reason now for fleeing the country just after killing the man, except your excitement?
A. Only under the excitement.
Q. You had friends in McAlester, didn't you?
A. I don't know; I didn't know whether I had any friends or not; people had been friendly with me; I didn't know how long it would last of what it would be after I got into trouble.
Q. Did I understand you to say you had never heard of your pocketbook; never saw it afterwards?
A. Yes, sir.
Q. Did you leave that at Pat Gleason's?
A. No, sir.
Q. Are you certain you didn't?
A. Yes, sir.

Here court adjourned until Tuesday morning, August 16th, 1892.

271 TUESDAY MORNING, *August 16th*, 1892—9:00 o'clock.

Mr. FREDERICK. I want to offer, by way of further showing the bad reputation of Yates, the record of his conviction here by the court; this is for the purpose of going to show the manner of man he was.

The COURT. It is only for whiskey, and I do not suppose it would hardly be competent unless he was a witness. It might be used against him as a witness. The conviction of that kind would hardly show a trait of character that would be in issue in this case.

Mr. FREDERICK. While it would not directly show that, a wjiskey peddler—I don't know whether he is known throughout the world as so or not—but in this jurisdiction he is known to be a man of violence.

The DISTRICT ATTORNEY. It would not be competent, anyhow.

Mr. FREDERICK. We offer to show that the deceased was convicted and sentenced by this court to the penitentiary.

The COURT. That is overruled.

(Defendant excepts.)

272 Defense rests.

273 The defendant called George Perry, a witness whose name appeared on the back of the indictment, and who was sworn upon be-

half of the U. S., but not called. Said witness, George Perry, was called by the defendant for the purpose of cross-examination. During the examination of said witness, George Perry, the district attorney asked the witness this question: "Did that other man go up to Yates and get astraddle of him and take his pistol?" And also the following questions: "I will ask you if you saw that man that was shooting out in this direction, after Yates fell, go up to him, get straddle of him, and take his pistol and belt from him and his money?" Also the following: "I will ask you if on the following morning you did not tell a man called Dad Depew and Burt Salmon, and others, perhaps, who were—I don't know whether there were any others there or not—and Dad Yandell, that when deceased left the house he started down the road; that you followed him, put your hand on his shoulder, and begged him to come back; that you walked with him down the road until he came close to where the defendant met him; that then he was fired upon, and that he was shot down and killed, perhaps firing a shot or two himself; that the first ball went between your legs; that you run and that you finally saw the man who shot him, Marshall, this defendant, walk up to him, get astraddle of him, and rob him of his pistol and his money?" To all of which questions the defendant at the time objected, which objections were by the court overruled, to which ruling of the court the defendant at the time excepted. On the cross-examination of Robt. J. Abbott, a witness for the defendant, the district attorney asked the following questions:

274 "You say the defendant's reputation for peace is good? Had you heard that he killed a 'nigger' in Mississippi?" To the asking of said questions the defendant at the time objected, which objections were by the court overruled, to which ruling of the court the defendant at the time excepted.

On the cross-examination of B. F. Roberts, a witness for the defendant, the district attorney asked the following questions:

"And at the end of that time he (defendant) killed a man in a bawdy house in a fight, yet you say in that length of time (two months) you can know a man's reputation?" Also the following questions: "Can a man make a reputation in two months' time? Is it not a thing that is built up little by little in your estimation? I want to get your idea of what reputation is. Do you think that any man can establish a reputation in two months' time? What do you think about it? Had you heard that he had killed a negro in Mississippi; that he was a refugee from justice out there?" To the asking of which questions the defendant at the time objected, which objections were by the court overruled, to which ruling of the court the defendant at the time excepted. On the cross-examination of Ed. G. Sprague, a witness for the defendant, the district attorney asked the following question: "How many 'niggers' has a man got to kill and how many knives has he got to carry in his shoes before he has got a good reputation?" To the asking of which question the defendant at the time objected, which objection was by the court overruled, to which ruling of the court the defendant at the time excepted.

The United States to further maintain the issues on her part introduced and examined the following witnesses:

275 Bart Salmon, John Salmon, R. G. Depew, John Mitchell, who testified as follows:

276 *Testimony offered by the Government in rebuttal.*

BYNUM COLBERT, having been duly sworn upon behalf of the Government, was examined in rebuttal by the district attorney, and testified as follows, to wit:

Question. What is your name?

Answer. Bynum Colbert.

Q. Where do you live?

A. In Fort Smith.

Q. Do you know the defendant?

A. No, sir.

Q. Do you know a man named George Perry, a witness in this case?

A. Yes, sir.

Q. Please state if you saw him at Wagoner after the killing of Yates at South McAlester?

A. Yes, sir; I saw him at Wagoner; I don't know just how many days it was after the killing. I was going on to Muskogee and I met him at Wagoner.

Q. Do you know whether that was before or after he was tried for the murder of Yates.

A. Before he was tried.

Q. Had he been arrested at that time?

A. No, sir.

Q. It was after the killing of Yates and before the arrest of Perry?

A. Yes, sir.

Q. I believe you are a deputy marshal?

A. Yes, sir.

Q. If he made any statement to you about the killing of Yates, as to what was done from the time that Yates left the house until he was killed, I want you to state to the jury what he said.

Mr. FREDERICK. We object to what this witness will testify as to contradict Perry, on the ground that the prosecution can not contradict its own witness.

277 The COURT. That objection is overruled on the ground that for the purpose of contradiction he is not the witness for the prosecution. The facts in this case are that the witness was called and sworn as a Government witness, but was not called to testify by the Government, but called and put on the stand by the defendant for the purpose of cross-examination, and the court holds that the Government under such circumstances has a right to impeach him by contradiction.

(Defendant excepts.)

The DISTRICT ATTORNEY. You heard the question asked you; please state what he said to you about it.

A. I don't know that I can state the exact words that he said.

Q. Well, as near as you can?

A. I left here in the evening on the 4:00 o'clock train, and when I got up to Wagoner it was about dark, and I was waiting for the train to go south, and George Perry spoke to me; he was setting on a cross piece there at the depot.

Q. You met Perry there, did you?

A. Yes, sir; he told me he suspected he would be arrested.

Q. What for?

A. For murder.

Q. Of whom?

A. Yates, he said; Jim Yates, I believe he said. I says, "Who is after you?" And he said, "Ratterree will arrest me." He said, "If they will send me word I will come down; I haven't killed anybody," and he spoke about some man—Marshal, that done the killing. He said he had shot Yates down and kept his pistol and some money; didn't say what amount of money there was, and had gone to Mississippi.

Q. That Marshal did?

278 A. Yes, sir; and he said Bill Smith—I knew him in his life time—cut the ball *put* of hi*d* arm, out of Marshal's arm, and he put both pistols on and struck out. I believe that is about all that he said to me that I can remember of at that time.

Cross-examination:

Mr. FREDERICK. How come him to tell you anything about it at all; were you acquainted with him?

A. Yes, sir.

Q. You think that is about the way that he told you?

A. Yes, sir.

Q. He was expecting to be arrested himself then by Ratterree, who he understood was hunting for him?

A. Yes, sir.

Q. Ratterree is a deputy United States marshal from this court?

A. Yes, sir.

Q. And he went on to tell you how it was that he didn't do the killing?

A. Yes, sir.

Q. He said to you that he didn't do the killing?

A. Yes, sir.

Q. That Marshal did the killing?

A. Yes, sir.

Q. You knew Tom Yates, too?

A. Yes, sir.

Q. Now, how long had you known him?

A. I had been knowing him about 6 or 7 years.

Q. Do you know his reputation as to being a desperate, lawless man?

A. No, sir. I saw him here in this court once; I don't know much about the man.

Q. Do you know anything about his character, his reputation?

A. I don't any more than hearsay.

Q. That is what I am talking about; that makes a man's reputation and character. What people may say about him. From that

279 could you say you knew his reputation as to being a desperate, lawless man, from what the people say about it?

A. I heard the people say that he went to the penitentiary once; that is about all I know about him. That he was sent from this court. I never dealt with the man; never seen the man very much.

280 BART SALMON, having been duly recalled by the Government, was examined by the district attorney, and testified as follows, to wit:

Question. Do you know George Perry?

A. Yes, sir.

Q. Big George, as he is sometimes called?

A. Yes, sir.

Q. You stated in your examination in chief that when you first went up the morning after the killing, early in the morning, to the body of Yates, that you found George Perry there, I believe?

A. He was there about the time that we got there.

Q. Please state if, in the presence of yourself, your brother, John Salmon, and Dad Depew, he made any statement as to how the killing occurred the night before?

A. Me and Dad Depew and John Salmon and Jack Ellis and George Williams went up there together——

Q. You have stated heretofore you went up there; I don't care for that. Answer yes or no; did George Perry make a statement to you?

A. Yes, sir; he did make a statement in the presence of us.

Q. What did he say?

The way it come up, some one said that Yates had been robbed, and George Perry said, "If you catch Marshal you will find the man that robbed Yates." He says, "You will find a twenty-dollar gold *peice* on him." George went on to state that him and the defendant, Marshal here, were coming down the road, and it seems that—I mean Jim Yates instead of the defendant, were coming down the road.

Q. That George Perry and Yates were coming down the road?

A. Yes, sir; and the defendant, Marshal here, was shooting—there is some little trees at the side of the road, and some barrels, where an old beer dive has been, from the looks of the place; I did not see it
281 there, but I seen the old *peices* of barr*les* and boxes, where they had been put by somebody, two or three little trees there, and he said that Marshal here shot and the ball passed between his legs and he left Yates. Marshal shot him down, and jumped straddle of him and unbuckled his belt and taken it off, or throwed it off, and taken his money.

Q. After he shot him down?

A. Yes, sir.

Q. Did he say where he saw that from if he left when the shot went through his legs?

A. If he said it I didn't hear it.

Q. But that Marshal shot from behind——

A. About where these barr*les* and trees were.

Q. That the bullet went through his legs?

A. Yes, sir.

Q. Then he turned and left?

A. Yes, sir; he left loose of Yates and Marshal shot him down and unbuckled his belt and throwed it off, and taken the money.

Q. Did he say anything about having his hand upon Yates?

A. I could not say whether he did or not, for sure; I believe he did; but I would not be sure.

Q. You said something about his letting go of him?

A. Yes, sir; he said he let him go.

Mr. FREDERICK. We make the same objection to this witness as the last one.

The DISTRICT ATTORNEY. Of course the objection goes to the whole subject-matter, I suppose. (To the witness). Did he say how he got the belt and pistol? Did I understand you to say that he got straddle of him?

A. He jumped straddle of him and taken his belt off, throwed it off, and taken his pistol, and took his money. That is the way I understood it.

Q. You say there was a place there where they had barr*les* and *noxes* w'ere this old beer dive had been?

282 A. Yes, sir; they said it had been an old beer dive. There was barr*les* and boxes, or p*eices* of barr*les* and *noxes*.

Q. Did he point it out to you? Were you present where you could see it?

A. Yates was laying right there; we could see the place that he left Jim Yates.

Q. He told you this while Yates's body was there, before it was taken in?

A. Yes, sir.

Q. How far was Yates laying from the place where he had pointed out to you as the place where Marshal did the shooting?

A. It was a short distance, 10 or 12 or 16 feet *feet*, or something like that; I guess it might have been a little bit further; I did not step it. It would be a short distance, though.

Q. Please state if there was any pocketbook or papers of any kind found there.

A. I didn't see any papers of any kind. After George made the statement we picked him up, carried him in the house and laid him out, and then I went away, went down to South McAlester and took the Choctaw Railroad.

Q. Do you know whether any papers were ever found there?

A. I saw the pocketbook that Mr. Lindley said was Mr. Yates's pocketbook.

Q. Who had it?

A. Mr. Lindley, the ch*eif* deputy at South McAlester.

Q. That is the book that Pat Gleason speaks about?

A. I could not say.

Q. You do not know?

A. I seen the book there, and Mr. Lindley said that was Yates's book.

Q. Where did you see it?

A. At Mr. Lindley's house.

Mr. FREDERICK. I don't know that there is anything in that, but that is not a fact.

283 The DISTRICT ATTORNEY. I asked him if there was a book found by the place and he has gone on and stated about that. I am inquiring about the defendant's book, a morrocco book, that he claimed to have lost.

A. I heard some one say they wondered where Yates's writ book was——

Q. I am n't talking about that; you are talking about a matter that I am not talking about at all. I don't mean Yates's book.

A. I never heard anything about any other book.

Cross-examination:

Mr. FREDERICK. That was early in the morning that George Perry was telling you?

A. Yes, sir; it was in the morning.

Q. Before sunup, was it not?

A. I believe it was; I am satisfied it was.

Q. Dad Depew had George Perry under arrest at that time, did he not?

A. If he did I didn't know it.

Q. George Perry was being accused of it?

A. There was some evidence of George Perry being there; there was some talk of arresting him afterwards.

Q. It is a fact that Dad Depew did arrest him afterwards, is it not?

A. That is what they say. I never saw George while Depew had him under arrest.

Q. Did you see Depew take his chain up there to arrest him and chain him?

A. No, sir.

Q. You didn't see Depew with a chain at all?

Answer. No, sir.

Q. It was just about sunup or before that Perry was telling
284 you this, in the presence of you all?

A. Yes, sir.

Q. And at the same time he was being accused of it himself?

A. Yes, sir; some of them had said something about it, I believe, as we went up there, that they thought that George Perry had something to do with it. I could not say which one of us it was.

Q. You spoke about boxes and barrels; was there boxes and barrels piled out there, or just pieces of boxes and barrels?

A. Some old pieces of boxes and barrels, as I said while ago.

Q. No barrels a standing up as a barricade?

A. No, sir; I did not notice whether there was any whole barrels there or not; they said it was where the beer dive had been.

Q. There was no boxes and barrels around there except the pieces of them?

A. There was one standing up there. I could not say whether it was whole or not, for I did not look at it particularly. Jim Yates was laying there, and we were talking and *and* showing how it was.

Q. How far was Yates from these boxes and barrels?

A. Some 10 or 12 feet; I could not state just exactly. I never st'pped it.

Q. How far was Yates lying from that lower house called Lulu's?

A. He was lying right in the road there from that house where Lou lived; that is in the edge of the road.

Q. That is the house you carried him into?

A. Yes, sir.

Q. How far was he laying from the house below?

A. I could not say exactly how far; it may have been 50 or 75 yards, or 100 yards.

Q. It might have been about 35 yards might it not?

A. It was further than that.

Q. It was below where this little skirt of trees stood, and the rocks on the road. It was south of that?

A. Yes, sir.

285 Q. It was south?

A. Yes, sir; I think so. I could not say just whether it was exactly south or not.

Q. Which house was he nearer to, the one where the beer dive was or the one they call Lulu's house, where you carried him to?

A. I believe he was nearer Lulu's house.

Q. Then, if the houses were only about 125 or 50 yards apart, then he might have been not 75 yards from Lulu's house; was he?

A. I think the houses were farther than that. As I said while ago, I never measured the ground.

Q. If they were 130 yards apart he could not have been 75 yards from Lulu's house. Was he not $\frac{2}{3}$ of the way from the beer house down towards the other house?

A. No, sir; I don't think he was.

Q. You never measured; you don't know?

A. No, sir.

Q. You didn't go back up there to observe the distance after that?

A. No, sir; I never took any note of the distance.

Q. Did George Perry seem to be much excited that morning?

A. No, sir; he didn't seem to be excited, although I was not with him much.

Q. Do you know Pat Gleason?

A. Yes, sir.

Q. Are you interested in this case, taking any part in this prosecution? Haven't you been aiding the district attorney? Didn't you go to Pat Gleason and get him and go with him down to the district attorney's office?

A. I went down to Pat Gleason's boarding house and brought him up there. I told Mr. Clayton (the district attorney) that Pat Gleason was bound to state something the way I did; what occurred down to his house.

Q. You went and got Gleason and carried him to the district attorney?

A. Yes, sir; he said to bring him in there.

286 Q. The district attorney talked to Pat Gleason?

A. Yes, sir.

Q. He knew he was a defendant's witness, did he not?

A. I suppose he did.

Q. You knew he was?

A. Yes, sir; Pat had told me that he was a defense witness.

Redirect examination:

The DISTRICT ATTORNEY. You are a deputy marshal?

A. Yes, sir.

Q. I sent you for him?

A. Yes, sir.

Q. That is correct, is it not?

A. Yes, sir.

Recross-examination:

By Mr. FREDERICK. You are not a deputy marshal for this court, are you?

A. No, sir.

Redirect examination:

By the DISTRICT ATTORNEY. It was this morning I talked to him.

A. Yes, sir.

287 JOHN SALMON, having been duly recalled upon behalf of the Government, was examined by the district attorney, and testified as follows, to-wit:

Question. What is your name?

Answer. John Salmon.

Q. You were on the stand before?

A. Yes, sir.

Q. In your examination in chief you said you were one of the parties that went to the body of Yates the morning after he was killed.

A. Yes, sir.

Q. Please state if you saw George Perry there.

A. Yes, sir; I saw Mr. Perry there.

Q. Please state if he made any statement there as to how and as to who killed Yates?

A. Yes, sir; he made a statement.

Q. What statement did he make to you?

A. Mr. Perry told me, Bart Salmon, Mr. Ellis and Depew, and Dad Yandell, I believe, was with us, that Mr. Marshal shot him, Mr. Yates; that they had had a difficulty up there at the house, and Marshal had went away, and sometime after that there was a shot fired and the ball passed the house, and Mr. Perry and Mr. Marshal came out and walked down the road together—I mean Mr. Yates and Mr. Perry. There was a shot fired which went between Mr. Perry's legs, and he run up there, and Yates fell right away after that.

Q. Who did you say went out of the house when the shot fired?

A. Mr. Perry and Mr. Yates. I first said Perry and Marshal, but I meant Perry and Yates. Excuse me for making the mistake. Yates made the remark, "That is that fellow coming back, now," and they walked off down the road together. He said they walked down the trail. There are two houses, and I suppose they are a quarter apart,

288 but I don't know the distance, as I never measured them or paid much attention to them.

Q. Then what?

A. They came to a little grove, and there was a shot fired just before they got there, which went between Perry's legs.

Q. Then what?

A. They shot then; the shooting commenced; they kept on shooting and Yates fell.

Q. You mean by that that they both commenced shooting?

A. Yes, sir.

Q. And Yates fell?

A. Yes, sir.

Q. Then what?

A. And he said the defendant here, Mr. Marshal, jumped straddle of him and took his belt off and got his money.

Q. Jumped astraddle of him after he fell?

A. Yes, sir; that is what Mr. Perry told us voluntarily.

Q. Do you remember him saying anything about a twenty-dollar gold piece?

A. Yes, sir.

Q. What did he say about that?

A. He said he had twenty-seven dollars and a half.

Q. Said Yates had?

A. Yes, sir; a twenty-dollar gold piece. And he said when we caught Marshal that we would find the money.

Q. Do you know of any papers or book of any kind being found in and about there?

A. No, sir; I didn't find any books at all. When we found him he possibly had some papers in his coat pocket. I didn't search him or anything of the kind.

Q. I am not talking about Yates, but the defendant, Marshal.

A. I don't know what he had.

Q. I asked if there was any papers or anything of the kind; any morocco pocketbook found there?

A. No, sir; I didn't see any.

Q. You didn't search the defendant; he run off?

A. Yes, sir.

289 Cross-examination:

By Mr. C. J. FREDERICK. You say that Yates had papers in his coat pocket?

A. I say if he did, I didn't see them.

Q. What was it you said about papers in his pocket?

A. I said he might have had them; we didn't search his pockets or the coat; I didn't when we carried him down to the house.

Q. Did he have on a coat?

A. I don't remember whether he had a coat on or not. I never paid much attention to that. We carried him down to a house to a woman's named Lou, and we laid him out, and I went back after a doctor.

Q. How far was it down to Lou's house where you carried him?

A. I suppose about 100 yards, probably, where he was killed; I do not think it was over 100 yards. I never paid particular attention to the distance.

Q. How far are these houses apart?

A. I suppose about a quarter of a mile; 2 or 300 yards apart. In fact I didn't visit these places very often.

Q. You only went there at night; you could not observe the distances very well; is that it?

A. No, sir; I never was there but once before. I was up there one night when they had a row on the hill, and they sent down to the marsal's office for a man to go up there.

Q. Wasn't up there once at a dance?

A. That was the same night.

Q. Did you dance?

A. Yes. sir; I danced one set.

Q. Was it a chippy dance?

A. Yes, sir; chippy dance, they called it.

Q. You are a married man, are you not?

A. Yes, sir.

290 Q. Didn't you live at South McAlester?

A. No, sir; I live at Red Oak.

Q. Have you been taking an active part in this prosecution?

A. The district attorney has had me in the room talking to me, and I told that on the stand.

Q. Have you got any feeling in this case against the defendant?

A. No, sir; we had always been good friends.

Q. You and Yates had always been good friends, hadn't you?

A. No, sir; me and him had some difficulties.

Q. Do you know what his reputation was as to being a lawless and desperate man?

A. I know he was a deputy marshal.

Q. I didn't ask you about that. I am speaking about his character as a man; do you know his character as a man who was desperate and lawless?

A. No, sir; I could not say. Me and Yates had a difficulty on the Choctaw train, as far as that is concerned. Me and Mr. Yates was not on very good terms.

Redirect examination:

The DISTRICT ATTORNEY. I will ask you if Bart Salmon and this defendant were not the best of friends?

A. Yes, sir; Bart says yet ——

Mr. FREDERICK. It is immaterial to tell what Bart said.

291 R. G. DEPEW, having been recalled by the Government, was examined by the district attorney, and testified as follows, to wit:

Q. You stated when you were on the stand in your examination in chief, that you went up to the body of Yates on the morning after he was killed, early in the morning?

A. Yes, sir.

Q. Please state if you saw George Perry there?

A. Yes, sir; he was there?

Q. Please state if he made any statement there in the presence of you gentlemen who were there with regard to this matter?

A. Yes, sir; he made a statement.

Q. You may confine yourself in the statement to the talk you had with him about the matter from the time that he and Yates left the house, if he told you that, until after the shooting?

A. He said he started with Yates from this beer dive up there, and came with him down to where there was a ledge of rocks, just out of the ground, there was a trail, path, and there was a ledge of rocks shot out on the ground there, and he said he had his left hand on his right shoulder walking along by the side of him, and he said there was a ball whizzed passed, a shot from over there where these barrels and little bushes were and passed in between his legs, and he let go of Yates then and run back up towards the house again. He said he got up towards the house there, he showed us where, and he said he looked back and he said Yates was down, and Mr. Marshal was on top of him and taking his money and his pistol.

Q. Did he say anything in that conversation about any twenty-dollar gold piece that you remember?

292 A. He said he had some money, but I could not say positive what he said the amount was. He said he had some gold.

Q. Do you remember the denomination that he said he had?

A. No, sir.

Q. Did any of you there find any papers or books?

A. No, sir; I never seen nothing of that description.

Cross-examination:

By Mr. FREDERICK. How far was this body laying from the house of Lou's—that lower south house?

A. I suppose the houses are 150 or 100 yards, or something like that, apart, and I called it about halfway betwixt the two houses.

Q. Did you go up to the other house—the beer dive?

A. Yes, sir; I went up there after that. We was up there some time; I don't know whether it was before we carried Yates into the house or afterwards.

Q. What were you up there for?

A. We went up there to see where Mr. Yates and Mr. Marshal had the fight there. George Perry took us up there to show us where they had the fight.

Q. Did you have George under arrest at that time?

A. No, sir; not at that time, I didn't.

Q. How long after that until you arrested him?

A. I could not tell you exactly; it was three-quarters of an hour or an hour.

Q. Did you put chains on him?

A. No, sir.

Q. You took the chain along to put on him?

A. No, sir; I didn't have no chain on him at all.

Q. You did arrest Perry there?

A. Yes, sir.

Q. He knew at the time that he was making this statement that

293 he was being charged with it, accused of it?

A. I don't know; I suppose he didn't.

Q. Hadn't it been talked around there?

A. No, sir; not then it wasn't. There was Jack Ellis and several came to me and——

Q. Were you with Bart Salmon?
A. Yes, sir.
Q. You say you know it hadn't been talked about?
A. No, sir; not at that time that we came up there; if there was I didn't hear it.
Q. You didn't hear it; that is it.
A. If there was I didn't hear it. I know it wasn't in the crowd there, for we were all standing right around there.
Q. If Bart Salmon could have heard it you could have heard it?
A. I don't know anything about that.
Q. Who asked Perry to make the statement?
A. Mr. Ellis, I think; he was talking to the crowd. I don't know who asked the question.
Q. Did anybody ask him to make any statement at all?
A. He commenced to tell it, anyway—he commenced to tell about the murder.
Q. You don't know whether anybody asked him to say anything or not?
A. Yes, sir; I think so.
Q. You think that he made a statement about it, and you think that he was asked about it; now, which was it?
A. Somebody asked him to make a statement; they asked him how it came about and all about it.
Q. Who?
A. I don't know who. It was some of the crowd.
Q. Did you?
A. No, sir; I don't think it was me. I am pretty sure it wasn't me. I talked, too, but I don't think I was the first one. He talked
294 about it—commenced to talk about it himself as soon as we went up there—commenced to tell about the fight.
Q. Did you ask him any questions?
A. Yes, sir.
Q. Did the others ask him questions?
A. Yes, sir.
Q. You were asked, when you were on the stand the other day, if you did not once reside in Washington County?
A. Yes, sir.
Q. I will ask you if you were not waited on by citizens up there and told to leave the country?
A. Yes, sir; I was.
Q. Didn't you leave there in the night?
A. I had to, same as George Reed and the others had to.

Redirect examination:

By the DISTRICT ATTORNEY. You were asked and told about that the other day when you were on the stand, and you told all about it?
A. Yes, sir. We were differen in politics.

295 JOHN MITCHELL, having been recalled by the Government, was examined by the district attorney and testified as follows, to wit:

Question. Did you know Jim Yates in his lifetime?

Answer. Yes, sir.
Q. Did you know him pretty well?
A. I had been acquainted with him a little over 5 years.
Q. Did you know the pistol that he owned?
A. Yes, sir.
Q. How did you come to know it?
A. I helped Mr. Yates put it together two or three days before he was killed; we straightened some of those cracks in it.
Q. Say if the pistol I now hand you is the pistol?
A. Yes, sir.
Q. I showed it to you outside?
A. Yes, sir.
Q. You say that is the same pistol?
A. Yes, sir.

Cross-examination:

By Mr. FREDERICK. Were you subpœnaed as a witness here?
A. Yes, sir.
Q. When?
A. Friday. I came here on Saturday.
The DISTRICT ATTORNEY. He is the man I put on and was not allowed to use because I had not given you notice.

Testimony closed.

296 The district attorney asked Bynum Colbert, a witness offered by the Government the following question:

"If he (George Perry) made any statement to you about the killing of Yates, as to what was done from the time that Yates left the house until he was killed, I want you to state to the jury what he (George Perry) said." The defendant objected to this question at the time, but the court overruled the objection, to which ruling of the court the defendant at the time excepted.

On the examination in rebuttal of Bart Salmon by the district attorney, he was asked the following questions and gave the following answers: "Do you know George Perry?" "Yes." "Big George, as he is sometimes called?" "Yes, sir." "You stated in your examination in chief that when you first went up the morning after the killing, early in the morning, you found George Perry there, I believe?" "He was there about the time we got there." "Please state if, in the presence of yourself, your brother, John Salmon, and Dad Depew, he made any statements as to how the killing occurred the night before?"

"A. Me and Dad Depew, and John Salmon, and Jack Ellis, and George Williams went up there together."

"Q. You have stated heretofore you went up there. I don't care for that; answer, yes or no; did George Perry make a statement to you?"

A. "Yes; he made a statement in the presence of us."
Q. "What did he say?"
A. "The way it come up some one said that Yates had been robbed, and George Perry said, 'If you catch Marshall (the defendant) you
297 will find the man that robbed Yates.' He says, 'You will find a 'twenty-dollar gold piece on him.' George went on to state that

him and the defendant, Marshal here, were coming down the road and it seems that—I mean Jim Yates instead of the defendant were coming down the road."

Q. "That George Perry and Yates were coming down the road?"

A. "Yes, sir; and the defendant, Marshal here, was shooting. There is some little trees at the side of the road and some barrels where and old beer den has been from the looks of the place. I did not see it there, but I seen the old pieces of barrels and boxes where they had been put up by somebody, two or three little trees there, and he said that Marshal here shot and the ball passed passed between his legs and he left Yates. Marshal shot him down and jumped straddle of him and unbuckled his belt, and taken it off or throwed it off, and taken his money."

And other like questions and answers, to all of which the defendant at the time objected, which objections were by the court overruled, to which ruling of the court the defendant at the time excepted. Like questions were asked by the district attorney of John Salmon and Dad Depew, all of whom were deputy marshals and called by the Government to prove what George Perry had said as to how the killing of Yates occurred, and they gave similar answers to those given by Bart Salmon, to all of which questions and answers the defendant at the time objected, which objections were by the court overruled and their testimony permitted to go to the jury, to which ruling of the court the defendant at the time excepted.

This was all the evidence in the case. The district attorney in his closing argument to the jury made use of the following language:

"We know what kind of trials they have in the State of Mississippi of a white man for killing a negro. We know from reading
298 the newspapers and magazines that such trials there are farces. We are not living in Egyptian darkness but in the light of the 19th century. The defendant came from Mississippi with his hands stained with the blood of a nigger, and went to the Indian country, and in less than four months had slain another man." And other like expressions and declarations that the killing of a negro in Mississippi for which the defendant had been tried and acquitted there was murder. To all of which declarations, expressions, and arguments of the district attorney the defendant at the time objected, but his objections were by the court overruled and the defendant at the time excepted.

The court then charged the jury as to the law as follows:

299 In the circuit court of the United States within and for the western district of Arkansas. August term, 1892.

UNITED STATES
vs.
ROBERT MARSHALL HALL. } Murder.

Charge of the court. Delivered August 17, 1892, 9:50 *a. m.*

PARKER, J.:

GENTLEMEN: The defendant is charged in this indictment by the name of Robert Marshall, with having, on the 4th of August, 1891, with a gun, wilfully, and with malice aforethought, taken the life of James Yates.

The fact that he is indicted by the name of Robert Marshall does not make any difference in the case. He plead by the name of Robert Marshall Hall. It is the truth or falsity of this charge that you are called upon to investigate in this trial. It is to find out whether or not several things that go to make up the charge are true, that you have listened to this evidence and these arguments of counsel, and that you are now about to receive the law that is to be applied to the case. Your duty in this regard is twofold. It is, first, to find whether crime exists. That is a solemn and imperative duty. And the second duty, equally solemn and equally imperative, is to find what that crime is. If it be true that crime does exist, and you fail to discover its existence, or to say
300 that it exists, you commit a most serious blunder. If it be true that no crime exists, and you say that a crime does exist, you commit a blunder equally as great. I say a blunder committed on these propositions is of the most serious kind, because it is the public, the people, who have the greatest interest in the diligent and fearless enforcement of the law. And notwithstanding cases may be presented where individuals may not, at all times, have squared their conduct with the rules of morality, or right, yet under the law they are entitled to their rights in all cases until they forfeit them under the law. That is to say, they must do something which the law says is sufficient to cause their lives to be forfeited. When you make a mistake, I say you commit a blunder of the most serious character, because it is not alone the result in the case you may be trying that is felt, but the effect that exists after the case is over. You are great educators of the public, and a correct verdict is felt over the whole land for good, and the immoral and vitiating effects of a mistake made by a jury is felt for evil over the whole country. It is, in my judgment, largely to the mistakes of juries and courts that is attributed the lamentable condition of things in this country, all over it. That the people, and good people, in every State feel ashamed of it. Because of this, men ignore juries, where they create themselves as executioners of the law, without judge or jury. Where they go back to that state of savageism, indicating that they have lost all confidence in the tribunals of the land. There is not a good man in this State, or anywhere, I don't
301 care who he is, whose cheek does not mantle with shame when these disgraceful conditions called mobs are organized all over the land. There is but one correct, one honest, and one impartial way of administering the law, and that is by men whose minds are cool and deliberate, and who can approach the case in an impartial way, and consider*ate* it dispassionately. That is the only way that the law is to be administered. It is the only way, and that is the right way, and it is by the application of these characteristics that you possess that you are to get at a correct result in this case; to find out, first, if a crime has been committed, and then it is your duty, equally as solemn, to correctly name it. With the results of these things, you and I have nothing to do. God knows if you were consulted these scenes of blood would never be presented to another jury, because your advice would be against them under any and all circumstances. But it is your duty to see that the law is vindicated, whatever the result may be, if the evidence had produced a state of case where you can arrive at an intelligent conclusion, and that you can, with an equal degree of intelligence, correctly apply the law to that conclusion, and in that way get at a correct result.

Now, let us see what is necessary for us to look to to see whether crime does exist in this case or not, what we are to find as established by the testimony here. I remark, before approaching that part of the case, that this case of homicide, like all other cases, must be one that is applied to the one of three conditions, because there are no others that affect a
302 citizen under the laws of the United States. It must be either a case of homicide, or a killing in such a way and under such circumstances that in the estimation of the law it is murder, or that it is manslaughter, or that it is a case that is a c'se of homicide that is not criminal because the party who committed it had the right to do what he did do under the law.

Now, it is not according to your opinion or mine that either one of these conditions are found to exist. We are to go to the testimony to see what voice it speaks in that direction, or in the direction of either one of them. Then we are to go to the condition which is defined by the law—not as defined by our opinions of right or wrong, but as defined by that which has been declared to be the gathered wisdom of ages, to be declared by that set of rules whose mission is harmony, by reason of the protection and security it affords to the people—the law of the land, that which we, second to our Creator, worship from self-interest, if through no other higher motive, because it is the great protecting power that shields us by night and by day; that shields us from the bullet of the assassin, and that keeps it from crashing through our windows, though we are sleeping, at night to deprive us of our lives; that protects our property at a distance from us; that gives to every man every joy which is declared to us by the God of nature and the laws of the land, he should possess and enjoy. If we are worthy to *to* minister at its shrine, we must be capable of ascertaining whether guilt or innocence exists. If we are worthy to minister
303 in her temples we must be competent to say that crime exists when it does exist.

To know whether or not crime exists in this case, we must go to the law to find out what it takes to make up the crime, such as is charged in this indictment. We take it in detail. We take all its elements apart and we notice them in detail, that we may the better understand them, bearing in mind, of course, that they are all to be considered together when we come to con*c*lude as to whether a crime exists or not.

Now, what is the first thing to be found here? That James Yates is dead. Ask yourselves that question, and go to the testimony for an answer. If the testimony shows that fact beyond a reasonable doubt, there is one proposition essential to be considered to find out whether there is a crime in this case or not, because if he is not dead there can be no crime charged against any one for killing him. There is no controversy over that fact. The evidence proves it beyond question. As it is not a controverted fact, you may lay it aside as an established proposition in the case.

Secondly, did he die by violence of the kind named in the indictment? It is charged in the indictment, in substance, that he died because a wound was inflicted upon him by shooting at him with a gun. That is the literal la*b*guage of the indictment that is to be responded to or satisfied by the proof. If the evidence shows that it was done with a pistol, if it

shows that he received a wound upon his person from a pistol, or
304 inflicted by means of the use of a pistol, as men use it when they shoot with it, and that as a consequence of that wound he died, you may regard that proposition as established beyond a reasonable doubt. And as to whether the wound produced death or not is a subordinate proposition to the other. You have a right to consider the circumstances of the case. If he was in usual good health, and he was found dead shortly afterwards, with a bullet hole through a vital part of his body, you have a right to come to the same conclusion that you would as an ordinary citizen if you had such a set of circumstances, or if they had been presented to your mind in arriving at the result as to whether that was the cause of his death or not. There is no controversy over that, and there can not be any by the light of the evidence offered.

Third, was this act of shooting the act of the defendant? Did the defendant, in the manner and by the means named in the indictment, take the life of James Yates? By implication, in law, when a man says that he had a right to do the thing charged against him he admits that he did that thing. The defence of self defense, under the law, is an implied admission that the party did the act. It is a confession in the law. A declaration that "although I did it, I had a right to do it," and you have a right to go to the evidence, to the facts and circumstances of the transaction, to ascertain whether the defendant did the act which resulted in the death of James Yates, and whether that act is one such as is charged in the indictment. If your minds are satisfied upon that proposi-
305 tion, beyond a reasonable doubt, you have a right to consider it as established.

The fourth proposition is, was this killing done wilfully and with malice aforethought? Because, as I have already told you, you must find whether a killing occurred, and you must find whether that killing was a crime. If there was but one crime arising from the taking of human life, and you found that crime had been committed, you would necessarily find that one; but there are two crimes growing out of the taking of human life—one called murder and the other manslaughter. I do not know what view of this case you may take. It is not my province to know. My province and duty is to give you the law of the case, and it is your duty to find the truth of it and to make an application of that law. The law of manslaughter has not been particularly invoked by counsel in the case. The law of self defence and the law of murder have been. It is appropriate, although it has not been invoked, that in such a case the law of manslaughter, which is a crime occupying a midway position between murder and self defence, should be given, that you may see by contrast whether one condition or the other exists and make an application of such a condition to the facts in the case. It is not my province to say to you that you are to find this condition or the other, but it is my province and my duty to remind you again that it is your duty to apply the exact condition that is established by the proof and to make no mistake in the application.

If it is murder, you and I can't help it; if it is manslaughter, we
306 can't help it; if it is self defence, the defendant is entitled to the application of that condition. Now, then, I wish we could stop right here by my telling you that if a crime is done wilfully and with malice aforethought, that it is the crime of murder that exists; because,

after 17 or 18 years' experience, and with twenty or twenty-five of these cases on an average in a year having come before me—and I have had to repeat these definitions that often—the presumption is that after awhile—after 15, or 20, or 30 years more—it may become a little monotonous. I can't help it, and you can't help it. This case is entitled to its own law, and the law should be enunciated in this case as in any other, and it becomes necessary to discharge the duty resting upon us that I should give to you the definition of this crime of murder and that you should understand it and make the appplication of it, if the facts exist to warrant its application, and that I should give you the definition of the other offence, known as manslaughter, and of the other state of case, known as self defense, that has been expressly invoked in this case. In giving you the definition of murder, I can not stop by telling you that if you find that it was done wilfully and with malice aforethought you will find it was the crime of murder; because these expressions that enter into this crime are expressions that have a legal meaning attached to them, and that is the meaning that you are entitled to, in order that you may better understand the crime and that you may better comprehend the definition of it. It is the duty of the courts of the country to simplify the
307 law as much as can be done, to give it to the minds of the gentlemen who sit on the jury in a form as simple as possible, that they may understand it. To do that in this case I must take apart this definition and consider its different elements and give them to you as the law defines them. What are the elements, then, besides those I have named? Because there must be a death, and a death produced by the parties charged with producing it, by the defendant in this case, and that death must be produced in the manner and with the means used in the indictment, and that it was done wilfully and with malice aforethought, and these expressions must have a legal meaning or the meaning that the law attaches to them. In order that I may do this concisely and without a waste of words, I read to you a part of a charge delivered in another case in this court, where the term "willful" and the phrase "malice aforethought" are defined, as applicable in a case of this kind:

"The word 'willful,' as used in connection with the charge of murder, such as that which is preferred in this indictment against this defendant, means an intentional killing and not an accidental killing. It means an act which results in death that is intentionally done, and one that is not accidentally done. Now, there is a great difference in the law between that which is accidental and that which is intentional. The law fastens intent to every act that is not an accident. Every act that produces death that is outside of the definition of the word 'accident' is intentional in the law, whether it grows out of a specific design to take life, or whether it grows out of gross carelessness, or whether it arises from a condition of mind that prompts the possessor of that mind to be engaged in some other wrongful or criminal act, and in the execution of it a life is taken, provided it is a wrongful or criminal act, which, from its nature and the way it is executed, has a natural and probable and reasonable result, death may ensue from the execution of the unlawful or criminal act."

Now, I remark to you in this connection that you have no diffi-
308 culty in finding that the act which produced death was an intentional act when it is performed with a gun or pistol, provided the proof

shows that that gun or pistol was intentionally used in such a way as that it might produce death. What is meant by intentionally using it in such a way as that it may produce death? If a man approaches another in shooting distance of him, and draws his pistol and presents it at the other, within sho'ting distance and fires it at him, you necessarily have a set of circumstances which show that he was doing an intentional act, an act intended by the man and an act prompted by the mind, because the pistol is a mere inanimate thing; it can not draw itself from the place where it rests, its scabbard, or wherever it may be. It is a mere automaton; it must be used by some agency before it can produce any result whatever. You know that and everybody knows that. Now, if you see a condition of that kind you naturally come to the conclusion that the party is doing an act that is willful. It is upon a conception of that state of case that a man, when he is in the right, and when he does not destroy that right by his own misconduct, is entitled to stand upon the defensive. Then you have a right, I say, in this case, to see if the use of the weapon was willful, and if so, when a weapon of that kind is used, the result is necessarily wilful, and whenever a man uses a weapon in such a way as that it may naturally, or reasonably, or probably produce certain results, and that result is death, the law holds that the intention to produce that result is in direct contrast with that condition of case called a
309 an accident, because that which is an accident in the law is something which occurs after the exercise of the care that the law requires to be exercised to prevent its occur'ence. A man, for example, is handling firearms; because of their dangerous nature, and because of the the deadly results that may follow from their use in certain ways, the party is commanded by the law to exercise the very highest care to prevent a deadly result, and if he does not do that he is guilty of a willful act, the law says. If he does do it, and something occurs that is deadly in its character, notwithstanding the exercise of that care, then that is called an accident, because that is something that occurs after a person has exercised the amount of legal care exacted by the law and something occurs beyond that, and it is not then regarded as a willful act, and the law, under such circumstances, recognizes that he does not do it wilfully, but when he does an act which naturally or reasonably or probably, from its nature and the way it is done, produces a certain result, that is held to be an intentional result, because the act as done in that way is intentional, and whenever an act is done and it is an act that would naturally or probably produce a certain result, whenever the act is intentionally done the result is intentional. For example, if a man presents a gun at another and fires it at him, the fact of drawing the gun and firing it shows that he wills what he does, shows that that act is a willful act upon his part, and when that state of facts exist the act of presenting and firing the gun is recognized by common observation and common experience as a willful act. If that act produces death, because there is a known connec-
310 tion between the act and the result which is probable, which is usual, and which is reasonable, the party is said to have intended the result, and consequently to have willed the result. Now, intent is something that can be found only by inference. It can only be found by the circumstances in the case, by the nature of the act done, and the way it is done, and the character of the weapon used, bearing in mind that the

law holds every man to know the nature of the weapon that he uses, the purposes for which it is constructed, and the results that naturally and reasonably are produced by it. That is recognized by the law as a matter of common knowledge within the mind of every man who has arrived at the years of discretion. For that reason, when a man presents a gun or pistol at another, and shoots it at him, the law says he intends to kill him, because the killing is a result that is natural or probable or reasonable. It is a result that may follow. It is a result that does often follow, and the fact that such results ensue from such acts is a matter of such common knowledge as that every man who has arrived at the years of discretion is presumed to know it; in other words, he is presumed to have intended the consequence of his act, and it is because of the knowledge of an act of that kind, and the result it may produce, that that rule follows as one of the rules of the law. So, in a case of that kind, when you are called upon to find whether he intends to kill or not, you find, first, whether he presented the deadly weapon in shooting distance of him and fired it at him, whether that was a willful act, and when you find that from the character of the weapon used, and the manner of its use, because the weapon
311 can not use itself, it can present itself; it can not pull its own trigger, it can not of its own accord or of its own will power, because it has none, send a deadly missile in the body of the man who is killed. There is an intelligent will power that does all that. I say when you find a gun or pistol has been held in that attitude, and that it has produced a deadly result, as reasonable men, as men of common knowledge, of common observation, you must come to the conclusion that the party willfully did that act, and when he willfully does an act of that kind he willfully produces the result.

A word in this connection as to how you may find the act was willfully done.

"The presumption that the law recognized is that a man is held to have intended the natural and ordinary consequences of his act. Every sane man who is a voluntary agent, acting upon motive, must be presumed to contemplate and intend the necessary natural and probable consequences of his own act. If one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended so to destroy such person's life. So, if the direct tendency of the willful act is to do another some bodily harm, and death in fact follows as a probable consequence of the act, it is presumed that he intended such consequences, and he must stand legally responsible for it. So, where a dangerous and deadly weapon is used with violence upon the person of another, as this has a tendency to destroy life, or to do some great bodily harm to the person assailed, the intention to take life or to do him some great bodily harm is a necessary conclusion from the act."

You take the act done. Now, your common observation teaches you that a gun or pistol fired at another within shooting distance of him will put his life in danger; it may probably destroy it. Then find whether the gun or pistol was presented intentionally, and fired intentionally; if
312 so, you have to find the act was willfully done, and if you find that the act was willfully done, because of the connection between the act and the result, you have to find that the result was willful. Therefore

it becomes easy when you understand what is meant, first, by a willful act, and how you may find it, to find this characteristic of the crime of murder, to find that the act was willfully done which produced the death. Now, it is important to note the meaning that the law gives to this word. It is important to remember how you may find it, because you take a state of case where the man willfully kills another, and if there is not that which mitigates the crime—that is, reduces the degree of it to one of less grade than murder, or shows that he had a right to kill him—the fact that it was done willfully shows not only the first element of the crime of murder, but shows the second characteristic and the distinguishing characteristic of it; that it was done with malice aforethought, because, as you will learn presently, malice aforethought means the doing of a wrongful act in such a way and under such circumstances as that the act is not mitigated or justified which produces the death. That is an act which has malice in it. The fact of a man deliberately selecting and using a deadly weapon, such as a gun or pistol, provided he does not have a right to use it, or provided there is not that condition of facts which are called provocative facts in the law, so as to mitigate the act, the fact of his selecting and using a weapon of that kind, being a willful act, being willfully done, is a condition that shows the existence of this other characteristic that I am now about to give you, and which is the one that distinguishes murder
313 from any other kind of homicide. If a man kills another under such circumstances as that it is voluntary manslaughter. He does it willfully, he does it intentionally. When he kills him so it is self-defense, the very fact that he comprehends the condition that produces the defensive right of the party, shows that he acted in a willful way, and that he willed what he did.

We now come to the trait that distinguishes murder from any other kind of homicide. This trait is known as malice aforethought. We want to know what that means; we want to know how to find it. I pass by the definition of this word willful with the belief that you fully understand it, and that you can correctly and intelligently make application of it; not only that, but that you know how it may be found to exist by the evidence in the case; what character of act is necessary to show its existence. We then come next to the phrase "malice aforethought." We must see what it means, and see how we may find its existence, because it is something that arises from the condition of the mind of the party doing the act. We must find some way or another of getting at the condition of the mind that is doing the act, for we can not fathom it, we can not penetrate its inmost recesses to see what is going on there. We must adopt some other means that are reasonable, some other process that is rational, to get at the mental condition of the party, because both of these characteristics of the crime of murder spring from the condition of the mind of the party. The law says we may do it by circumstances. Now, I am not going to take up the time of this jury by reading to you any of the reported cases in which the opinions of great lawyers, great jurists, and great publicists have been given. You have heard them before
314 this term at least two or three times either to you as a jury or in your hearing, and it is unnecessary to repeat them, or to give you any other statement as to the meaning of this kind of evidence, except the one I am about to do in connection with the definition of this crime of

murder. The law says we may find it by circumstances. We may do it by reason of the character of the act done, the manner in which it was done, and we may solve the condition of the mind by the light of the facts and circumstances that surround the act, going to characterize it, to show what manner of act it is, bringing to bear upon a condition of facts of that kind the observation of men of mature judgment, of men of intelligence, of men who, because of the amount of information they possess, are to the greatest extent qualified to discharge the great and responsible duties devolving upon them as jurors. As I have remarked to you before, when malice aforethought exists, murder exists. Now, let us see what is meant by that; let us get an understanding of it if we can; let us comprehend it fully, that we may make a proper application of it to the facts in this case. If the facts show that it exists in this case, or that James Yates's life was taken willfully, and this other element surrounded the transaction known as malice aforethought, the killing of James Yate swould necessarily be murder and nothing else. Now, what is this element of the crime? It is defined by the law in a general way to be the doing of a wrongful act without just cause or excuse in such a way and under such circumstances as to show that it was done wrongfully, and that it was done in the absence of that which would give the party the right to defend against it; or that it was done in the absence of
315 mitigating circumstances. And it is defined again as *as* the doing of a wrongful act without just cause or excuse, and in such a way as to show that he who did it had a heart void of social duty and a mind fatally bent upon mischief. Let us see again how the law defines it, and then again how the law tells us it may be found to exist. It can only be found by circumstances, because malice aforethought, like willfully, is something which exists in the mind that is necessary to be found to make up the elements of the case, and as you can not get into the mind to know what is getting on there (and you could not tell what was transpiring there if you could get into it), you must learn it in some other way; and there must be some rational way by which you may learn it, some way that rational men would adopt, because you are not authorized to adopt any other method than that which is reasonable in arriving at conclusions, and there is a reasonable way, which is the way the law recognizes as a proper way by which men may arrive at conclusions. It is from the nature of the transaction, the nature of what takes place, the character of the thing done, and all the surrounding facts and circumstances that you are authorized to take into consideration to see what was the nature of the thing done, whether it was an innocent act or a criminal act, and, if a criminal act, what was the nature of that criminal act.

"Malice aforethought is the grand criterion which distinguishes murder from other homicide, and is not so properly spite or malevolence to the deceased in particular, as any evil design in general."

Now, if a state of cases exists which shows that a man kills another because of spite or animosity, or grudge, or ill-will, that evidences
316 his malice aforethought, but that state of case need not exist to show the existence of malice aforethought, for it may exist without it.

"The dictate of a wicked, depraved, and malignant heart, a purpose to do a wicked act; and it may be either expressed or implied in law. Express malice is when one with a sedate deliberate mind and formed design doth kill another, which formed design is evidenced by external circumstances, discovering that inward intention, as lying in wait, antecedent menaces, or former grudges, and concerted schemes to do him some bodily harm. So in many cases when no malice is expressed the law will imply it, as when a man willfully poisons another. In such a deliberate act the law presumes malice, though no particular enmity can be proven, and if a man kills another suddenly, without any or without considerable provocation, the law implies malice, for no person except of abandoned heart would be guilty of such an act upon a slight or upon no apparent cause."

It implies it in every case where a man willfully kills another, and there is not in it such facts or circumstances as would go to mitigate the crime to that of manslaughter. The law, from the act being willfully done, infers malice aforethought. It implies its existence because it is the doing of a wrongful act in the absence of mitigating facts, without just cause or excuse, and that is one of the definitions of malice, because in such a deliberate act the law presumes malice, though no particular enmity can be proven. The fact that you can not prove particular enmity is a fact that is recognized by the law. It is recognized as being difficult to get at under the law, so as to get at motive. You can not find motive frequently. Therefore the law says you need not find it. If you can find it, so much the better, because that helps to show the condition of the mind of the party who did the crime, but it happens sometimes that the motive may be a spirit of enmity that you can not get at, and because you can not find it because it is impossible for you to do so, you need not look for it, but if you find that the killing was done
317 willfully, or without mitigating facts or circumstances under the law, the law recognizes it as your duty to say that it was done wickedly, done with a spirit of malevolence, done wrongfully, done so that it has malice aforethought attending it.

"And if a man kills another suddenly, without any or without a considerable provocation, the law implies malice, for no person, except of abandoned heart, would be guilty of such an act upon a slight or upon no apparent cause.

"Malice is an intention to do bodily harm, a formed design to do mischief. It has also been defined as a deliberate intent to kill."

A man has a deliberate intent to kill if the opportunity offers; he makes up his mind to kill if he has the chance. That is murder, because it is neither a condition where he has a right to defend himself or ask that his crime may be named manslaughter, or the conditions are forced upon him without his contemplating a previous purpose to take life, and he only takes life in that manner because from the necessity to save his own, and in the other case his mind is not normal; it is in an abnormal condition; it is a condition suddenly sprung upon him when he has no contemplated previous purpose to slay. Whenever he has a contemplated and formed purpose to kill, if occasion offers, he puts himself in an attitude where he commits the crime of murder.

"It does not necessarily import especial malev'lonce toward the individual slain, but also includes the case of a generally depraved, wicked, and malicious spirit; a heart regardless of social duty and deliberately bent on mischief."

Now, let me explain what is meant by these expressions. There is a social duty resting upon each and every one of us. The highest duty of each and all of us is to preserve human life. It don't make any
318 difference that the life may be a bad one, unless the party puts himself in an attitude in the law where his life can be destroyed, although the life is a bad one, it is the duty of all parties to see that that life is protected. That is the highest duty that rests upon every one. It is our duty not only to observe it, but to protect that life it be necessary, if we can do so under the circumstances, and whenever we fail to do that we are said by the law to have a heart void of social duty, and we have wantonly and recklessly destroyed a human life when it is not necessary; and it is not necessary when it is recklessly and wantonly and wickedly done. The fact that we so destroy life shows that we have a mind fatally bent upon mischief, and it is then said by the law to be a condition that evidences the existence of a heart void of social duty and a mind fatally bent on mischief, and consequently the existence of the condition that has attending it malice aforethought.

"It imports premeditation. Therefore there must logically be a period of prior consideration, but as to the duration of that period no limit can be arbitrarily assigned."

That is, the purpose to kill, or to do an act that may result in death; if the purpose to do the act that may be deadly is contemplated, then the purpose to kill exists.

"The time will vary as the minds and temperaments of men, and as do the circumstances in which they are placed. The human mind acts at times with marvelous rapidity. Men have sometimes seen the events of a lifetime pass in a few minutes before their mental vision. Thought is sometimes referred to as the very symbol of swiftness. There is no time so short but that within it the human mind can form a deliberate purpose to do an act; and if the intent to do mischief to another is thus formed as a deliberate intent, though after no matter how short a period of reflection, it none the less is malice.

"Malice is an intent of the mind and heart; the doing of a wrongful act without just cause or excuse, or in the absence of that which justifies the act, or which reduces the grade of the crime. Whenever a wrongful act is done without just cause or excuse, and in the absence of mitigating circumstances, which produces death, it is murder, whether it grows
319 out of special spite or animosity, or a specific design to take life, or the purpose to do some other act of a wicked and malignant and criminal nature, which, because of its nature and the way it is done, a human life is taken, malice aforethought exists, because that is the doing of a wrongful act without just cause or excuse, which results in death. It evinces a formed design to do such mischief as may deprive a fellow-being of life.

Malice is an intent of the mind and heart. There is never presented to a jury direct evidence of what was the intent of the man's heart at the time.

"You can not tell by direct proof, bearing in mind the distinction between these two kinds of evidence, positive or direct proof and circumstantial evidence. Positive or direct proof is the proof which shows the existence of the very thing itself that you are hunting for."

If, for instance, it becomes necessary to show that A shot at B, and C says that he saw A shoot at B, that is positive evidence of it, positive proof of the shooting, of the fact necessary to be found, and because the evidence is so near to the thing itself it is called evidence positive of it; when it is further off from that thing, but is still evidence standing around the thing done, it becomes circumstantial, or, in other words, circumstantial evidence. Circumstantial evidence is proof that may be equally cogent and equally powerful proof of the existence of the thing, but it is not the thing itself, but is that which shows the existence of it in the shape of the surrounding facts and circumstances. In the shape of the things surrounding the killing, showing how it was done; in the shape of that which attends every transaction in life; which goes to characterize it one way or the other; which goes to show either that it was a criminal act, a criminal transaction, or that it was a transaction that was honest and upright and void of crime.

"There is never presented to a jury direct evidence of what was the intent of the man's heart at the time. He is the only possible and direct witness to that, and if he meant so to testify he would plead guilty.
320 The existence or non-existence of malice is an inference to be drawn by the jury from all the facts in the case. The emotions of the heart, the processes of the mind, are to us, or to anyone outside of the individual, exhibited by the acts which the individual performs, and you are entitled to infer what his intent was, what were the processes of his mind and the feelings of his heart, by a careful study of the acts which he performs, and all the other external indications which he may have given of what his state of mind and heart was. As an eminent text writer has put it, there is no case of malicious homicide in which malice is not inferred from attendant circumstances; no case in which it is demonstrated as express. It can not be demonstrated as express."

It can not be demonstrated as express, because you can not get at this thing that is necessary to be found by that kind of evidence. Therefore it necessarily follows as a reasonable conclusion that in every case of homicide where you are trying to find out whether it was a crime or not, where you are trying to find out whether these elements that go to characterize murder exist, you must necessarily resort to circumstantial evidence, or do nothing; one or the other. The only method of protection outside of resorting to circumstantial evidence in every case where a human life has been taken is by the shotgun and the Winchester and the pistol, because you can not get at this essential element of the crime of murder by any other means than by the light of circumstantial evidence; and if you ignore it, if you disregard it, there is no enforcement of the law; we are powerless, and we are in anarchy; we are at the mercy of the lawless, the desperate, and the wicked, and they are our autocrats, are our rulers. We must depend upon this character of evidence. The law authorizes us to depend upon it, because it says whatever is legal evidence may be sufficient evidence, provided there is enough of it to establish the facts in the case, and this

circumstantial evidence is legal evidence, and we are therefore to
321 look to it, and look at the case by the light of this sort of evidence, in order, above all things, that we may be able to characterize it, because if a man kills another, and it be true that he is guilty of a crime, he is not apt to say so. It is a rare occurence in the experience or observation of mankind that you will find a man who will come up and say so. You can not get it by his words expressing his purpose at the time of the killing. You can only get it by his acts done at the time, not by his acts as they are attempted to be covered up or concealed, but as they really and naturally exist. That is the only way you can have his purpose disclosed here so that you are enabled to characterize the case, to say whether it is murder or what it is.

"We have no power to ascertain the certain condition of a man's heart. The best we can do is to infer his intent more or less satisfactorily from his acts. Now, a person is presumed to intend what he does. A man who performs an act which he knows will produce a particular result is from our common experience presumed to have anticipated that result, and to have intended it. Therefore we have a right to say, and the law says, that when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed at any definite period before the fatal blow."

A man snatches up a gun or pistol and kills another; if there is nothing to justify that killing, if there is nothing that is so far provocative in its character as that the party may ask that his crime be reduced, from the fact of the selection of the weapon in that way, and with that character of circumstantial facts you may infer a premedi'ated purpose to kill. And whenever you find a premeditated purpose to kill, in the absence of justification or mitigation, you find murder. You can find nothing else, because when I contemplate beforehand that I will take the life of my fellow man without cause, without mitigating circumstances, and I subse-
322 quently, in furtherance of the contemplated purpose to take his life, do take it, you have evidence of the doing of that terrible thing before you, and the law says that such circumstances indicate a murderous intent, and indicate the existence of malice aforethought.

"From the very fact of a blow being struck we have a right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant, and thus we frequently find the statement laid down in reported cases, and by text writers, that malice is to be inferred from the use of a deadly weapon."

I modify that by saying that unless something else is shown when you have the bare, naked facts that a man kills another with a gun or pistol, you have a case of murder.

"Malice is to be inferred from attendant circumstances which surround transactions, and the jury have a right, and it is their duty, to look at these attendant circumstances to see what character of act it was, to see what was the condition of the mind of the party or parties who engage in that act, as being one way that they can arrive at the conclusion as to whether it was an act accompanied with malice aforethought, or the converse of that, in which there was an absence of that element of the crime of murder."

Now, anything that shows deliberation, anything that shows a premeditated purpose to do a wicked or willful act that might result in death, is evidence that may be considered by the jury as evidence of malice and of the existence of malice aforethought. For instance, the law lays it down as a principle if premeditation is shown, if the purpose to kill directly existed in the mind of the party or parties who killed, or the purpose to do a wicked act that might result in death is shown by the action of the party to have had a previous existence, an existence prior to the time of the killing, that shows the existence of malice aforethought, provided there is an absence from the case of that state of facts
323 which goes to show that the party had a right to do what he did do. The law lays it down that the deliberate selection and use of a deadly weapon shows premeditation, shows that the act was thought of beforehand; and whenever a party enters upon whatever unlawful or criminal enterprise he may enter upon, and prepares himself with a deadly weapon, for the purpose of using it in a deadly way if the occasion offers, and he does use it in that way and takes life, that is murder, because the law says, as you will learn presently when we come to the law of self-defence, that it is a man's duty to avoid the deadly necessity. It is his duty to avoid deadly danger whenever he can, with due regard to his own safety, and when he is out of the way of it, if he arms himself with a deadly weapon, and hunts it up, though that deadly danger may still exist, he searches it out, and he goes to the place where it exists, for the purpose of having an affray, that he may have an opportunity of using deadly violence, in such a case the law says there is no self-defence for him. And not only that, but because of his premeditated design, the want of necessity by way of acting to defend himself, that it is not only a crime, but it is the crime of murder and nothing else under the law.

I think I now have given you the general definition of malice. I have stated it in various forms, that you may the better comprehend it. I have told you that it shows a purpose to do a wrongful act without just cause or excuse, and I have told you the way you may find it, that you go to the killing, you ascertain how the killing was produced, the way it transpired, the way it was done; you see what character of weapon used;
324 you see whether that weapon was prepared, whether it was deliberately and willfully used at the time, and in a state of case where the evidence shows that the killing was willfully done, if there is an absence from the case of that which shows that the party had a right to so willfully kill upon the law of self-defence, or that the killing was willful, but that there were mitigating facts attending it, the proof which shows that it was willfully done, shows that it was done with malice aforethought, and in a case of that kind the very same degree of proof that shows a willful killing will establish a killing with malice aforethought. These are the two elements which make up this crime. If you find their existence, as I have defined them to you, your duty is to find that murder exists, and if you find that the defendant did these other acts that I have named to you, that is, he shot Yates to death with a pistol, you would necessarily find that he is guilty of the crime of murder.

Now, this other crime of manslaughter, as I have told you, is one which occupies a position *w*idway between murder and self defence. It is a killing that is not excusable upon the ground of self defence, and it is a kill-

ng that is not murder, because there is an entire absence from it of this premeditated purpose to slay, if occasion offer, which goes to make up the crime of murder. The law contemplates that it is a condition brought into existence suddenly, by the act of the party killed at the time of the killing, not after the blood had had sufficient time to cool, not after the mind had had time to assume that normal condition which is held
325 by the law to be a condition of deliberation, so that it can think and that it can perform its duties in such a way as to resist the temptation to take life, but a state of case, as you will learn from the law, that springs into existence suddenly; not a state of case that is prepared for by the party arming himself with a deadly weapon, with the intention of using it if occasion offers. Whenever he does that, although he may be in an affray at the time of the killing, the fact that he has so armed himself with the purpose of using deadly violence if occasion presented itself, shows deliberation and premeditation, shows that he thought of it beforehand, shows the selection of a deadly weapon with the purpose of using it, and it banishes from the case any such condition as can be defined as manslaughter, because that contemplates a state of case where the mind of the party is in that condition that there is no purpose to kill, but a purpose to kill sprung up suddenly, because of provocation received at the time of the killing, or so near thereto as that the mind of the party has not had time to cool or to become deliberate since that act; and when a party acts under that impulse, that impulsive condition of the mind created by the adversary, or by some act of his, he is guilty of manslaughter. If a man arms himself and goes into an ordinary affray or difficulty with another with weapons, with the purpose of using them if occasion presents itself, if he kills the other there is no manslaughter in a case of that kind, because he had no right to arm himself and enter into that condition with the purpose of using the deadly weapon if he can have an opportunity of so doing. The law does not permit him to do that. The law says
326 when he does that he contemplates a purpose too kill—prepares for it. There is the means prepared for it beforehand; he is in an attitude that he can not call it a defensive attitude, nor can he call it an attitude where manslaughter exists, because manslaughter does not exist in such a case as that. What is manslaughter?

It is the only crime as effecting human life that is defined by the statute of the United States. Murder is not defined by the statute. The statute simply says that a man shall suffer death if he commits murder. The definition of it is left to the common law existing at the time of the enactment of the statute in 1789, when the code of laws of the United States was first adopted.

Section 5341 of the Revised Statutes of the United States provides that:

"Every person who, within any of the places or upon any of the waters described in sec. fifty-three hundred and thirty-nine, unlawfully and willfully, but without malice, strikes, stabs, wounds, or shoots at, or otherwise injures another, of which striking, stabbing, wounding, shooting, or other injury, such person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter."

That is a statutory definition of the crime of manslaughter. It is defined again by the common law. And it is substantially the same defi-

nition. We are told by the law of the land what sort of a state of case it springs out of, what kind of a condition must exist in order to make this crime. Now, of course, when we are talking about a case such as we have before us, we contemplate the existence of a state of case that grows out of a case of violence done by the party slain at the time of the killing, or so near thereto as that there was not time for the party's
327 blood to cool. There are other cases that may mitigate the act of killing, so far as to reduce it, but they are not conditions that have any bearing in this case. They are conditions brought about by insults or indignities and words alone, and other things attending them, outside of blows, because words, the law says, can not justify even a single assault. Nor may words mitigate a killing, so as to reduce the grade of it; they can not justify it or mitigate it. Let us see how the law defines this crime:

"Where, upon sudden quarrel, two persons fight, and one of them kills the other, this is voluntary manslaughter; and so, if they, upon such occasion, go out and fight in a field, for this is one continued act of passion; so also, if a man provoked by any gross indignity, and immediately kills his aggressor, it is voluntary manslaughter, and not excusable homicide, not being *se defendendo*. In these and such like cases, the law kindly appreciating the infirmities of human nature, extenuates the offense committed, and mercifully hesitates to put on the same footing of guilt the cool, deliberate act and the result of hasty passion."

There is a distinction between acts that are cool and deliberate, and acts where a man has a premeditated purpose to kill, where he prepares himself to kill, where he arms himself with a design to take human life, and an act where there is an absence in the estimation of the law, of premeditation. Where at the time of the killing the party killed is doing that in way of violence which puts the mind of the party killing in such a condition as that the law contemplates he is not acting in a premeditated or deliberate way, but acts hastily, and that the act of killing is not one contemplated, or thought of, or prepared for beforehand, but one which is done because of a sudden condition of things, created by the adversary who was killed at the time of
328 the killing, or so near to that time as that the party's mind had not had time to cool. Now, that is the definition of this other crime, and the law says it is a condition that stand midway between murder and self-defense. It is a sort of a half-way crime, that only exists when the facts warrant you in finding its existence. It does not exist if murder exists in the case, no more than if self-defence exists, or if there was no crime at all existing. If there is in existence facts, which, under the law, shows the existence of murder, it drives out of the case this other crime of less grade. If they show the existence of murder it drives out of the case this other condition denominated as a case of self-defence. Now, it may be necessary to allude to this definition further on, when we get to other parts of the charge that I will give to you. The other condition that we have named is that of self-defence, which gives the right to kill, to take a human life. It is that condition which the law says from necessity the individual is put in an attitude of not only being judge of the law, but of being executioner of it, and practically and really at the time he is acting as judge and jury and executioner all at the same time. He

is judge of what the law says, though not sworn to do so. He finds what the facts are, though not sworn to try the case according to the law and the evidence. He makes an application of the law to the facts, and he finds a verdict and he enters up a judgment, and then and there, all at the same time, executes that judgment, and takes a human life. Now that he may be permitted to discharge that responsibility, or that condition
329 of thing that rests upon him properly, his conduct must be viewed in the light of the law giving him the right to act in this double capacity. In other words, he is not to use this law as a shield or covering for a state of case that does not come within it. If the case comes within it, he is entitled to the provisions of the law for his protection. If the case is outside of it by the terms of the law, then he can not stretch it in order to cover his case. He must stand within the purview of the law or he can not be benefited by it. It is necessary that you should know what state of case gives a man a right to kill, gives a man a right to set as judge, jury, and executioner, all in the same instant, and too, when he is not dispassionate, deliberate, and disinterested, as you are, because the only interest that you have is to find the truth, and to find it in a legal and proper and just way, and to make an application of that principle of the law that is applicable to the case. That is the only interest in the case that you are prompted by. You are capable of looking at both sides of the case. You are capable of weighing the testimony. You are capable of taking the dispassionate view of the case and of considering the law that is applicable to the conclusion that you may arrive at in a cool, deliberate, and honest way. But the man who acts so as to take human life, to do that thing which is the most serious thing of all others, and it entails the most serious effects upon society if it is done wrongfully; the man who, I say, is so situated when deliberating upon the law applicable to him and to the facts of that case, and in making an application of the law to them, and in finding a verdict
330 and in entering a judgment on the death of the man before it could be written out and promulgated or proclaimed, the man is in a condition of mind different to yourselves. You are the arbiters as to whether he had a right to invoke the law of self defence. In the language of an eminent jurist he acts upon a parallel with having a jury to pass upon the question, to see whether it is a state of case where he may readily, properly, and legally take the life of the party. You are to find out from the truth of the case whether that was the condition really and actually existing, or there were such overt facts existing or outward facts that had an existence as to lead a reasonable man to conclude that it did exist, and that the party honestly and in good faith acted upon it when he does not do that which deprives him of the right to invoke it, because you will learn presently that a man by his own conduct may cut himself off from that right. This law of self-defence is a law of right which is applied to conduct that is right and proper. It protects men when their conduct is right and proper. If their conduct is of a character that is wrongful in the law, and so far wrongful as that he may create or contribute to the character of the condition that surrounds him, he is not entitled to the law of self-defence. There are other conditions that I will give to you presently which deprive him of this right by doing because of their being wrongful acts, and being done by him, cuts him off from the right of self defence, and he can not

invoke the law at all, no matter what the other party may do while that condition exists that he has created, or assist in creating by his own conduct.

331 Now, let us see what this law is. Let us see how it is defined, bearing in mind the connection with the definition of this law that I will presently give to you, the obligation that rests upon every citizen and that he must observe, and must discharge this obligation before he is entitled to these provisions of the law.

"A man who in the lawful pursuit of his business," that means if he is doing that which he has a right to do at the time of the killing, "is attacked by another, under circumstances which denote an intention to take away his life, or do him some enormous bodily harm, he may lawfully kill the assailant.

When? When he seeks a difficulty? When he seeks an affary? When he creates it by his own wrongful conduct? When he hunts up his adversary that he may get a chance to shoot at him? No. But "provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can or disabling his adversary without killing him."

If he is attacked by another under circumstances which indicate a purpose then and there to take his life or to do him some enormous bodily harm, he may lawfully kill his assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power. Now, that is the law and that is what you are sworn to administer. And if a state of case is presented which is directly the opposite, a state of case where a man hunts up his adversary, where he prepares himself with a deadly weapon and hunts him up that he may have a difficulty with him, that he may have an

332 opportunity of shooting at him, that is a state of case that is the opposite of the condition that is prescribed as one which will protect the man by this rule that I have read to you. Now, this phrase commanding him to retreat as far as he can contemplates that he should avoid the difficulty. If he is away from where the danger is, although it may exist, if it has an existence, and he is out of the way of it, his duty is to keep out of the reach of it; his duty is to keep away from it and not to hunt it up, not to seek it. If his adversary is at a place, and he knows if he goes there there will be danger to his life, his duty is to avoid that place, although, as a general proposition of the law, he has a right to do what the law permits him to do. In this case, as an abstract proposition, the defendant had a right to hunt for this book, if it is true that he had lost his book there; but if he knew there was deadly danger there, if he knew there was a probability of getting into an affray there with his adversary, with whom he had had a difficulty, it was his duty to keep away from there at that time, and under such circumstances he would have had no right to go there, even to hunt for his pocket book, because I say a higher duty as affecting him would spring into existence, the higher duty as affecting him from the standpoint of self-interest, self-protection, if he contemplated there was deadly danger there, or danger of a difficulty, the duty to himself commanded him to avoid that condition, because he might lose his own life in it; self-duty commanded him to

abstain from it, and it is his duty to his adversary and to the public to do so in such a case. We are all vitally interested in the protection of human life. It is a public injury that is sought to be redressed; it is a
333 public crime that is to be correctly defined and correctly pronounced by the jury, and it is not to be pronounced in any bending or cringing way to suit the circumstances because the man killed may not have squared his life with the rules of uprightness or morality, but it is to be pronounced in exact accordance with the mandate of the law.

Now, what is the second proposition? It is just like the first one in all its requirements, except that it contemplates a state of case where the danger to life may not be real, but where the facts leading to a conclusion of danger may turn out to be delusive; but there must exist real facts upon which to base a conclusion of this kind. There can be no question about that, for the reason that a man can not act upon a bare conception in his own mind, upon nothing that is reasonable, and upon that create a state of case and say he thought the danger existed to his life and that he could not avoid it, and therefore he had a right to slay. The state of case from which he draws the inference, although it may not be a state of real danger, the facts surrounding it must indicate that danger does exist. Now, let us see what the rule of the law is:

"When from the nature of the attack there is reasonable ground to believe that there is a design to destroy his life, or to commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended."

That rule would be very delusive and very deceptive to the understanding of ordinary people who are not familiar with these rules of the law unless it is explained. It is necessary that it should have some explanation. I have partially given the explanation to you. The illustration given to this rule by the court which proclaimed it and it is a
334 rule over eighty years old, given together with the one I gave you first. It is the most accurate and concise statement of the law of self defence that has ever been proclaimed in this country, in my judgment, although at the time of its proclamation by the court which tried the case it met with great opposition, because it was in a time that we should all be warned against when we come to deliberate upon these matters in courts of justice—when there was great political excitement, at a time when men were more inflamed by that sort of thing than they are now. Men are more deliberate now, and I trust so deliberate and impartial that they can hear and determine these questions in courts of justice without any other consideration than a sense of duty.

At the time this rule was proclaimed there was great political excitement, and it was a rule declared by the courts as affecting a party who belonged to a party of opposite political belief than the party killed. It occurred in Massachusetts. The rule was severely criticised, because it was thought it declared that if a man thought he had a right to kill, he could kill upon that thought, and claim self-defence. They misconstrued the rule and did not do the court justice. It did not mean any such a thing. It means if the facts existing in the shape of acts of violence, or apparent violence, indicated a purpose to kill from the nature of these acts, and that the party could not avoid what seemed to be the result of

that act, except by killing, that he would have a right to kill. It gave this as an illustration: Suppose, the court says, A shoots at B, and B kills him because A is preparing to repeat the act, apparently. It turns out afterwards that A is not firing to kill him, but was simply trying
335 to frighten him. B, notwithstanding, acted in good faith in defending against what seemed to be real danger, and he could kill, though it may turn out afterwards that A only intended to frighten him, was playing the fool, and had no deadly purpose. Suppose, instead of that case existing, A hadn't offered any act of violence at all, but B had killed him, and said that he conceived in his mind a condition that led him to conclude there was deadly danger. He could not claim self-defence. You might as well destroy all law if this was the case, because it would say to every perpetrator of violence, "You go free; you are not to be punished," and everyone of them would come before the jury and proclaim in thunder tones, if possible, that he thought he had a right to kill. The law never enunciated such a rule as that. The law does not say that. It says, "when, from the nature of the attack," meaning that there is some attack of violence or apparent violence existing, and that a party must draw an honest belief from that and act upon it. It must be violence, too, or apparent violence, that he did not create, or that he didn't hunt after or search for. Now, these are the rules defining the right of self-defence. There are other definitions necessary to give as affecting them, as going with them, as being in accordance with these rules, and as qualifying them. They are states of cases where a man, from his own conduct, from his own actions, from the way that he acts in a case may deprive himself entirely of the right of self-defence, no matter what his adversary may do.

Let us see what the law says in regard to that state of case.

336 "A man can not take advantage of his own wrong to gain a favorable interpretation of the law. He seeks the law in vain who profanes against it. The party assaulted indeed shall, by favorable interpretation of the law, have advantage of this necessity, to be interpreted as a flight, to give him the advantage of self-defence, when the necessity put upon him by the assailant makes his flight impossible; but he that first assaulted hath done the first wrong, and brought upon himself the necessity, and shall not have advantage of his own wrong, to gain the favorable interpretation of the law, that that necessity which he brought upon himself should, by way of interpretation, be accounted a flight, to save himself from the guilt of murder or manslaughter. It is upon the plain principle that one can not willingly and knowingly bring upon himself the very necessity which he sets up for his defence.

"Let us next consider the nature or the quality of the act, the doing of which will so far break one's right of defence that if he kill another, although to save himself from death or great bodily harm, he will yet be guilty of a felonious homicide in some of its degrees. This branch of the subject has not, as far as we know, been considered as a topic for any text writer; nor has it been examined critically in any case which we have seen. Perhaps no general principle can be deduced from the cases; at least we shall not attempt this now, but shall proceed to examine separately the conclusions of some of them with reference to this point, and as this will involve some repetition we shall be brief.

"The doing of the following acts, then, has been held to so far abridge a man's right of defence that if he thereupon kill another he can not be acquitted of all crime:

"Commencing an assault, attack, or battery upon another."

Now, a man, of course, can not kill another because he is assaulted by a simple assault. He has no right to do that, because the law of self-defence is a law of preservation, and when you kill and claim justification you can only claim it upon the ground that the act by which you are confronted was a deadly act, or seemed to be so. If you commit an assault upon another, and in the affray which ensues after you have committed that assault you slay the man you have assaulted, the man you assault could not use deadly violence, beca'se you had so assaulted him, and because he attempts to do that you kill him. Although he is doing a wrong, you created the condition upon which he acted, and because of your creating it
337 by a wrongful act you are deprived of the law of self-defense, and you could only ask manslaughter in such a case as that. If you commit a simple assault, and in the affray which ensues because of your doing that you kill me you could only claim manslaughter, and nothing else. If you kill me when I am not using excessive violence in a brutal or unnecessary way, you would be guilty of murder. That is the first condition that cuts a man out of the right of self-defense. When he creates the condition he can not take advantage of what occurs, provided his act creating it is a wrongful act—is a violation of the law.

"Attacking another with a deadly weapon."

A man attacks another with a deadly weapon and in the affray that ensues because of the attack he slays the man he attacks, he is guilty of the crime of murder, and nothing else, because there he could not ask to have mitigating facts or circumstances in his favor, because in this instance, without cause, and in the absence of that which gives him the right of defense, or reduces the grade of the crime, he commits an act of deadly violence that might result in death, and it would be murder if it resulted in death. Therefore, in the condition that ensues because of that, there is no self-defense for him, no matter what the adversary may do. The state of case that gives the right of self-defense is one not created by the party who slays and then invokes the law of self-defense. It is one created by the party killed at the time of the killing. If the one who slays creates it, then he creates a wrongful necessity that he can not avail himself of, and the door is shut against him as far as self-defense is concerned. The third condition is:

338 "Going to the place where the slain person is with a deadly weapon for the purpose of provoking a difficulty, or with the intent of having any affray."

Now, when that state of case exists it not only shows a state of case, as I have already told you, that is murder, but it shows one from which is entirely banished the law of self-defense, and there is no law of self-defense in it, no matter what the adversary slain may do. When a party goes to the place where the slain person is with a deadly weapon for the purpose of provoking a difficulty, or with the intent of having an affray, because this law of self-defense commands a man to avoid the deadly danger if it is existing whenever he can do it with due regard to his own safety, and if he arms himself with a deadly weapon and goes to the place for the pur-

pose of using that deadly weapon, or with the purpose of having an affray when he gets there, if opportunity offers when he can use it, instead of seeking to avoid the necessity of taking life, he is creating a state of case where he can not take human life by an act of violence if occasion offers, and the law banishes from him the right of self-defense, no matter what the adversary may do in the affray generated by his act.

The fourth condition is:

"Using provoking language, or, it seems, resorting to any other device, in order to get another to commence an assault, so as to have a pretext for taking his life, or in order to have a pretext for inflicting upon him bodily harm.

"Provoking another for the purpose of bringing him into a quarrel, or so that an affray is commenced."

Either one of these conditions, though it may grow out of mere words, would be a condition where the party would be cut off from the
339 right of self-defense, and it is one of these cases where words do cut an important figure in a case. Words, ordinarily, do not justify even a simple assault; they do not cut any more figure than that, but when they are used for the purpose of bringing about a state of case to give a party a pretext to kill, then they become powerful facts to show premeditated design, to show the creation of an opportunity to execute that design, and under such circumstances, and when such a state of case exists, the party who used the words in that way has no right to invoke the law of self-defense, because it is a right that if he invokes he must be in the lawful pursuit of his business, in the language of the law of self-defense, to give him the privilege of invoking it. When he is so far in the wrong as to create a state of case out of which a killing ensues when he could have avoided that condition it is his duty to avoid it, and not to create it by a wrongful act upon his part.

Now, let us see with regard to the duty of a man who is hunting up an opportunity to do violence. Here is a case in which these rules I have given to you as to the duty of a man to avoid danger or avoid the necessity of killing are presented, the case of Vaiden v. Commonwealth, decided in Virginia:

"The deceased and Vaiden were at the latter's house one evening drinking and playing cards together. Some high words passed between them, growing out of the deceased charging Vaiden with cheating. Vaiden's wife told the deceased that he had promised to make no fuss, to which he assented, said good night, and left the house. He did not go away, however, for he was heard in the yard swearing very loudly and apparently much enraged. Hearing him, Vaiden took up his gun and started for the door, but was induced by his wife not to go out. Guns were evidently used instead of walking sticks in that neighborhood, for just then the deceased called through the window that he wanted his gun, and the weapon was handed to him through the door by Mrs. Vaiden.

"The deceased then walked away, accompanied by two other persons, and by a son of Vaiden's, who went with the party as far as
340 the fence to let them through the draw bars. As they stood at the fence talking Mr. Vaiden appeared with his gun, seeing which the deceased jumped over the fence, took hold of his gun by the barrel as if to use it as a club and rushed at Vaiden. The latter called out that if he

did not stop he would shoot him. The warning went unheeded, and when the deceased got within a few steps of him, Vaiden, falling back a few steps, fired. The deceased then struck Vaiden two blows with the breech of his gun and staggered back, mortally wounded, dying a few hours afterwards. Vaiden, indicted for the killing, set up the plea of self-defense. But the court held that he, being responsible for the altercation in following the deceased with his gun after he had departed from the house, could not avail himself of the plea, and he was convicted."

Now, that is exactly what the duty of each and every citizen is whenever there is a deadly condition, provide' that condition exists, and they can avoid it, it is their duty to do so, to keep out of the way of that condition. When we do not do so, but prepare ourselves with deadly weapons and hunt it up that we may engage in it if necessary, we cut ourselves out of the right of self defense.

"If an assailant comes up against me with a deadly weapon apparently meaning to use it, or if without such weapon he assaults me, breathing forth threatenings and slaughter, or by any other means that it is his intention to inflict upon me a beating of such a character as to imperil life, or to maim me, or to do me grevious bodily harm, then I may take life, when necessary to repel the assault. That is the general rule, and I have no doubt it commends itself to your good sense."

That is the statement of the rule of self-defense in another form as declared by Judge Lacomb, circuit judge of the southern district of New York, in the case of the United States v. King, tried recently in that court for murder, he having been charged with killing a soldier inside of the fort at Ft. Hamilton, that bringing it within Federal jurisdiction.

"But like all rules, it must be studied with its qualifications, and the first qualification to which I desire to call your attention is this: It is my duty when attacked to retreat as far as the fierceness of the assault would
341 permit. It used to be said that it was the duty of the assailed to retreat to the ditch or to the wall. That picturesque expression was coined before the days of fire-arms, when every man who walked the streets of London walked with his weapons by his side—his rapier or his dagger, his quarter-staff or single-stick. It is not adapted for our use now, and even when it was coined it was ill-adapted to its purpose, for a man might be assailed at a place where there was neither ditch nor wall within three miles. The rule laid down by later authorities and sanctioned by text writers of ability is this: It is the duty of the assailed to abstain from the infliction of death until he has retreated as far as he can with safety to himself. Here let me call your attention to a very apt illustration that is used, whether in a reported case or whether as the expression of a text writer I am not certain, but it is a convenient illustration to have before you. Manslaughter and excusable homicide approach each other very nearly, as you will see later on, and the distinction between them is thus indicated: 'In excusable homicide the slayer could not escape if he would; in manslaughter he would not escape if he could.'"

That is, in a case where there is actual danger, or danger that seems to be actual and of a deadly character. That is the first proposition to which I called your attention, to which the condition I am now giving you applies. Of course, if there was no deadly danger at the time, or if there has been danger once but it has passed and gone, and a party slays because an in-

jury may have been inflicted upon him, that is an act of vengence, and not an act of defense under the law of self-defense. The law of self-defense does not give the right to warp it, twist it, stretch it so we can confert it into a privilege of doing an act that is an act of vengeance and not an act that is purely defensive. We can not do that. We must seek other means and other redress if we have been injured. If we have received assaults, have been outraged, have received assaults of violence upon our person and that is past and gone, and there is a way to avoid any future acts of that kind, it is our duty to avoid them, and when we do not do it, and
342 it is true that they exist, and we go where it is, that creates a state of case where we would not avoid the danger if we could, and when we kill under such circumstances as that we are guilty of manslaughter. Self defence is a state of case where we could not avoid danger if we would that we didn't create or didn't contribute to the creation of.

Now, a little further on this subject of what is the duty of a man in order that he may have have a right to ask that manslaughter be applied to the act that is done. Reading from the case of State against Hill:

"The proper inquiry to have submitted to the jury on this part of the case was whether a sufficient time had elapsed after the prisoner was stabbed and before he gave the mortal wound, for passion to subside and reason to resume her dominion. For it is only during temporary dethronement of reason by passion that this allowance is made for man's frailty. And in prosecuting this inquiry, every part of the conduct of the prisoner, as well words as acts, tending to show deliberation and coolness on the one side, or continued anger and resentment on the other, was fit to be considered, in order to conduct the jury to a proper result."

That is what the court said in that case. Again:

"If the defendant sought the difficulty with the deceased for the purpose of killing him, and in the fight did kill him in pursuance of such purpose, it is murder. But, if the defendant voluntarily got into the difficulty or fight with deceased, but did not intend to kill at the time, yet did not decline further fighting before the mortal blow was struck, but drew his knife and with it killed the deceased, it is manslaughter, although the cutting and killing were done to prevent an assault by deceased or prevent deceased from getting advantage of the fight."

These are the rules defining this condition. If a man prepares himself beforehand with deadly weapons, with a purpose of getting a chance to use these weapons in a deadly way, seeks a difficulty, and in the fight kills the adversary in pursuance of such purpose, the law says such killing is murder. But, if a man gets into a difficulty with no purpose to kill, no purpose to slay, and by reason of wounds received, or injuries in-
343 flicted upon his person, the law contemplates his mind is brought to a degree of excitement that he could not deliberate, it could not premeditate, and that he acts under the influence of that excitement, rather than under the influence of a premeditated purpose, and slays, that is manslaughter. But self-defense and manslaughter are banished from the case if he enters it with previous preparation, and with a previous purpose to use deadly violence. And it is banished from the case where he prepares himself for that purpose, where he arms himself with a deadly weapon for the purpose of killing, and seeks an opportunity to kill.

Now, if this defendant and Yates had a difficulty when they were playing cards there, and if a sufficient time had elapsed after that time for the defendant to deliberate, to think as to what his duty was, for his mind to cool, and if you have evidence showing you that he went and obtained weapons for a deadly encounter, prepares himself for that purpose, the fact that he was deliberate enough to thus prepare himself, to thus seek out and get deadly weapons is a fact that you may take into consideration in passing upon the question as to whether sufficient time had elapsed—the time of two hours, as spoken of by some of the witnesses—between the time of the first difficulty and the killing, a sufficient time had elapsed for his blood to cool, if he had time, his mind was in that condition where he could go and get a weapon and prepare himself to take human life, then that is evidence of a deliberate purpose, that is evidence that the mind was capable of deliberating, that is evidence that the mind was capable of premeditating. That is not the condition that exists
344 and surrounds a party where he kills under such circumstances that he is guilty of manslaughter, because in such a case the law contemplates that his mind is not capable of preparing him for a deadly encounter, nor does he prepare himself for it with that deliberation, but he acts upon the spur of the moment and kills because he is smarting under the injuries received, and his mind is acting under the influence of that kind in the language of this law that I have read to you.

"If sufficient time had elapsed for the blood to cool or the mind to form a deliberate purpose, for the mind to deliberate, then there was cooling time and the law will not hold that the party acted under the influence of heated mind or inflamed mind that existed because of the existence of the first difficulty."

Now, then, threats have been invoked in this case, previous threats upon the part of the deceased, and the general bad character of the deceased, has been placed before you. Threats made by the party on trial charged with the crime, of course, are used for the purpose of throwing light upon his mental condition with reference to that act because if a man threatens another that may or not be a serious threat. It may or may not be a reflex of a mental purpose, yet it always goes to the jury for that purpose to be considered for what it is worth. A man, it is true, may make a threat against another, and he may abandon it. He may have made threats hastily. He may have made them in passion, and the passion may have subsided, and the consequent purpose to execute the threat may have passed away with the subsidence of the passion. It is not as certain a reflex of the mental condition as is the act, because you have the act, and there is no changing that act. It is done, and the circumstances can not be changed. It may be misrepresented by false
345 witnesses; they may falsely produce a certain result of perjury, but the real thing would exist as an exact thing; it then and there had an existence, and it is a more certain reflection of the mental condition than is a threat. But if a threat is followed up by the act, you have a threat that has a result, and the threat becomes more exact, it becomes more certain of what was the mental purpose, because when a man threatens the life of another and then prepares himself to take that life, and does take it, you have a right to consider that threat. And if threats of that character were made by this defendant, and at the time they were made,

although the party wasn't named who was killed, but afterwards the man Yates was killed by him, you have a right to use that as a reasonable fact to go to show you that he had reference to Yates when he was making these threats. I say you have a right to use threats as reflections of a design of a party entertained by him when he prepares himself for the execution of a design by selecting weapons and going to the place where the party was; that is evidence of the deliberate selection and use of a deadly weapon to execute a deadly purpose, and it will be a state of case, as I have told you, where the law would attribute the result, the death of Yates, to a deliberate preparation and deliberate condition of the mind of the party, rather than to a state of case where he killed in a state of hot blood. Because the fact of his being deliberate enough to select and prepare himself are facts that are to be taken into consideration by you. Now the question comes up, what figure threats made by the party who is killed cuts in a case? I have already told you that in this case we are
346 to seek, first, to find whether a crime has been committed, and if it has been committed, to punish its commission. In such cases as these the people are interested, and they are largely interested. The people's law says that no man is to lose his life unless in the way prescribed by the law, or under circumstances where the law says he may lose it. He may be a bad man, he may be a gambler, he may go to bad places, he may be guilty of bad acts, yet we have no right to take his life for that reason. We have no right to take his life because he may threaten us. If he has threatened us the law says there is a remedy to prevent the execution of these threats. He may be arrested and put in jail. That is a peaceful method of preventing injury, and that is the first method to be resorted to. We can not kill, then, for threats alone. Therefore, threats alone are never to be taken into account by a jury as justification for a killing. They do not cut that figure in the case, and they are not admitted for that reason. If they were, and every man killed who has made threats in his life, there would be a great many men killed, I apprehend, but the law does not weigh a threat in the balance against human life.

If threats had been communicated to the defendant—and the evidence in this case does not show whether he heard of the threats or not,
347 and they therefore stand before you as uncommunicated threats—he can not under the law go and kill the party because of these threats. The party must be doing something at the time that he was killed that indicates, from the character of the act that he was doing, that he is seeking to execute these threats. Then the party may not stand so long before he acts as in a case where no threats had been made, upon the principle that men who make previous intentional threats are more apt to carry out their purpose that they are then and there apparently endeavoring to carry out than in a case of a man who does not make threats. Therefore they are only what is called illustrative evidence in the case. They are only admitted to the jury in a case when it is left with the jury to say whether the state of case that they must accompany to illustrate exists or not—that is, whether at the time of the killing in this case Yates was doing an act that indicated a purpose to then and there slay the defendant, and the defendant, if the threats had been communicated to him, could take these threats into consideration as illustrating his purpose. If a threat had not been communicated, and it is a question as to what was the situation of

the parties with reference to each other at the time of the killing, the jury may take that threat into consideration in illustration of that situation, or to enable them to look at it so as to know what it was. Of course, a threat that is not communicated can have no influence on the mind of the defendant at the time of the killing, because he did not know of it, and therefore he did not act upon it; but that is a matter that may be used
348 by the jury when it is a question in the case as to what was the situation of the parties.

The other proposition that has been invoked here is the bad character of the deceased. That has been proven by witnesses, and it has not been denied by the Government, as far as I know. But the defendant in this case, or any other man, had no right to go about the country killing men who have bad characters. It would be a dangerous and mighty power in the hands of men whose conscious conception of duty and right might not be of the finest quality in the world. They might be so blunted or stunted by familiarity with vice, or with violations of the law, that they would not be competent to conceive who was a man of bad reputation, who was a man of bad character. The law does not permit any such power as that to be exercised in the hands of any man. General bad character, as a lawless and desperate man, is only used as an illustrative fact, like uncommunicated threats, or like communicated threats, if the character is kown to the defendant in the case. It may be used to illustrate the condition, if there is a state of case where the party who is killed is doing some act of violence at the time he is killed. If his character is notoriously bad, if his reputation as a lawless and desperate man is bad, we can conclude that he is more apt to have a deadly purpose than he who is not a man of that kind of character, but for the reason alone of his bad character, a party can not slay him. His bad character is to be taken into consideration as illustrating his acts at the time of the killing. Let us see what the
349 Supreme Court of the United State says upon this proposition in a case that went up from Utah, the case of Wiggins vs. The United States. I give you the opinion of the Supreme Court in very short form:

"Courts of justice everywhere agree that neither the bad character of the deceased, nor any threats that he may have made, forfeits his right to life, until, by some actual attempt to execute his threats, or by some act or demonstration at the time of the killing, taken in connection with such character and threats, he adduces a reasonable belief on the part of the slayer that it is necessary to deprive him of life in order to save his own, or to prevent some felony upon his person."

That is adopted as the language of the Supreme Court.

"Jurists and text writers appear to concur that antecddent threats alone, whether communicated or not, will not justify a subsequent deadly assault by the other party, unless the party who made the previous threats manifests, at the time of the act, a design to carry his threats into immediate effect."

A word further upon the law of self-defence.

"Actual danger of the kind," that is, of deadly nature, "or a reasonable belief of such actual danger, must exist at the time, else justification will fail. Repeated threats, even of a desperate and lawless man, will not, and ought not to authorize the person threatened to take the life of the threatener, nor will any demonstration of hostility, short of a manifest attempt to commit a felony, justify a measure so extreme."

Now, these are the principles that are invoked in this case. It is for you to say what is the state of case that exists here. I have given you the definition of the crime of murder and of the crime of manslaughter, and I have given you the character of case where a man can slay his fellow-man in a way to show that he had a right to do it as judge, jury, and executioner. I have told you what the duties of a man are to avoid danger. What his duties are that command him not to create a necessity where he takes human life, but to avoid that condition of things. I have told you what facts are necessary and that must exist to reduce the grade of the killing from murder to manslaughter. It is for you to say what one of these conditions exist, bearing in mind, of course, that if you find its existence it is your duty to proclaim it. If you fail to find the existence of that, but you do find the existence of the second, it is your duty to proclaim that. If you fail to find either the existence of the first or the second, but find the existence of the third, it is your duty to proclaim that.

Now, you are to look at this case by the light of the facts that are true in it. You are to pass upon the statements of these witnesses. If there is falsity in the case, and truth in it, you are to fasten your faith to the truth, and you are to eliminate from your consideration that which is false, as having no weight, no consideration, no power in this case one way or the other, because you are never to base your verdict upon that which is false. You are to make a diligent and faithful research after the truth. The truth is sometimes difficult to find, because witnesses come before you sometimes prompted by motive, and when so, you can not get at the truthfulness of their statemens except by viewing them in the light that the law says you may use to view them—you apply, in other words, these reasonable rules of the law, to see whether a man is telling the truth or not, and then when you have found out what that truth shows, you have gone so far towards solving the problem that is before you. The law gives you certain rules to apply. You take the very appearance of a witness before you, his manner of giving evidence. The manner of the witness may be deceptive; it may be simulated; he may be an actor; he may be capable of assuming a false attitude before you, but the very fact that he is capable of assuming a false manner, and he is doing so, if you can discover it, is evidence against his testimony, because a man's manner and his bearing and appearance, and everything else indicates the truth, if he is telling the truth, and when his manner indicates the opposite, he is lying, and whenever a man assumes a position that is counterfeit in the case, as shown by his conduct on the stand, his manner of giving evidence, the very fact he is counterfeiting shows that he is not genuine coin; shows that what he says can not be depended upon.

There is another mehod of getting at his evidence besides his manner. It is by taking that testimony and vieweing it in its own light, and applying to it to your observations in life as to the conditions that are proclaimed by his evidence, whether they are natural, whether they are reasonable, whether they are probable, as detailed by him. Now, your means of doing that arise out of the wisdom you have gathered or made up from your observation in life as men of judgment, men who observe the affairs of men. You looked at that evidence in the light of its consist-

ency, its reasonableness, its probability. In your judgment, if it is unreasonable, if it is unnatural, if it is inconsistent, you have a right to disregard it for that reason. On the contrary, if it seems to be reasonable, probable, and consistent, you may so far consider it as truthful, unless these elements are taken away from it which go to characterize it as true,
352 by other evidence, or by other facts in the case. In other words, you view its consistency and reasonableness and probability in its own light, and in the light of the other evidence, to find which is true and which is false, because there is a great conflict between that which is false and that which is true. You have a right to take into consideration the very occupation, the very calling, the very business of a witness, because your observation in life teaches you that a man who occupies a degraded position performs the work of a wicked occupation; a man who sells intoxicants at a place of dissipation and vice and crime and prostitution, is not of that character that would give him moral status equal to the honest farmer who raises his crop and gathers it, and loves to sit at his own fireside and worship at his own family alter, where there is purity and uprightness and sobriety and love of truth. A man of that kind stands upon a different plane from a man who pursues a discreditable and reprehensible and criminal calling, such as running a place for the sale of intoxicants in connection with a house of prostitution.

Therefore it is your duty in this case to consider the testimony of this man George Perry, who tells you what his occupation was, to consider his testimony in the light of his occupation, in the light of his surroundings, in the light of his very appearance before you, in the light of his actions upon the stand, and above all, in the light of other statements inconsistent with those made upon the stand by him, if proven by other witnesses who are perfectly reliable, because that is one of the most effective
353 means of showing that a witness is telling that which is false, that which is fabricated; that he is telling that which is not true, upon the principle that the truth to day, yesterday, to-morrow, and forever, is consistent at all times, and harmonious with every other relevant truth in the case. Therefore, if a witness comes before you and makes a statement, and the evidence shows that other times and other places, and to other parties he made statements that are directly opposite to those made upon the stand, you have a right to consider that contradiction against the party and against his evidence. Now, then, you apply these rules, and it is your duty to see whether the testimony of each and every witness in its own light, and in the light of the other truths in the case, is reasonable, consistent, probable, and natural in its own light and in the light of the other evidence. If so, that goes to show it is truthful evidence.

The defendant goes on the stand; he makes statements before you under oath; they are to be viewed in the light of the other facts in the case. If the other evidence that is truthful corroborates what he says you have a right to consider his evidence as strengthened by evidence of that character, but if the other evidence that is true contradicts what he says, it is your duty to consider his evidence weakened, just as you may attach credit to the contradicting facts. He makes his statement surrounded by self-interest, and consequently you may presume that what he says is prompted by motive upon his part. He stands before you having the strongest motive that a man can ever have in this life, to make statements favorable

to himself the strongest motive that any of us can have, and I
354–355 doubt not that there is a man living, or a man that is purely mortal, that was ever created who could resist the temptation to so act so as to protect himself when so situated. Human nature is of that character. It is so constituted that when the motive is powerful, by our observation in life, and by our experience in life in other matters, not in matters of this kind, we have felt the influence of that self-interest acting upon our own natures, or at least we have observed its influence acting upon the natures of others, and if we are to do justice—and that is what we are commanded to do if we are to get at the truth—and that is what we are commanded to do, we are to apply the rules of law that will enable us to find the exact truth. We must then apply this rule of human action that a man, as a general rule, will act in obedience to that motive that prompts him to act. When the motive is strong the presumption is strong that he acts in obedience to it. Therefore, in passing on the testimony of the defendant you are to consider his situation in this case, to consider that the result of your verdict is one, whatever it may be, that seriously affects him. If he is found guilty of the crime of murder he must pay the forfeit with his life, because it is the mandate of the law of the country. If he is found guilty of manslaughter he must pay the forfeit with imprisonment, because that is the mandate of the law of the country, and if he is found not guilty of any crime he is entitled to restoration to his liberty at once.

Put it to yourself, let each and every man put it to himself, if so
356 situated, would it not be natural and probable and reasonable that he would not resist the promptings of this powerful motive weighing upon his mind. He may desire to do it, but he is hardly capable of doing it. Created man is hardly capable of resisting it no matter what his desire may be. Then view that evidence in the light of that situation of the party and in the light of the other evidence that you may find to be true in the case.

You have a right to consider the good character of the defendant, if you believe that has been proven before you, but you are to consider to what extent that character has been established. The defendant was up in that community but a few months, and it is a question, in the first place, whether or not these parties had an opportunity to learn his good character, whether or not he was there long enough to establish a character one way or the other. These are propositions that you are to pass upon in passing upon the question, as to whether his character has been established one way or the other. The law, of course, presumes it good until the contrary is shwon, until the facts in the case show it was not good, or that his conduct was not good, or was not in accordance with the law. When that is shwon, as far as this case is concerned, the effect of the presumption of good character disappears from the case. But in passing upon the question as to whether his character has been established, you are to consider how long he was there, whether there was an opportunity to establish a character that was real, that was genuine. Reputation is only as a reflex of character. It is not the character itself.
357 Character is a thing; a reputation is the evidence of it. Reputation may reflex character or it may not. A man may go into a community and be there for a time, and his character for that time may be good enough. He has not been there long enough to create evidence of

that character in the shape of a reputation, because character is made little by little. It is the conduct of the man to-day, yesterday, and to-morrow, and all through the period of time that he may live in a community. If his walk in life and his conduct and bearing to his fellow-men builds up character little by little, so that a man of average intelligence and of just appreciation of what character is is able to say that his character is good, then he has a good character, but he must have an opportunity of establishing that. A man may be in a community for a short time, and he may conceal his real character by pretending to be good, by acting good for the time, and thereby deceive us. Therefore, in order to establish character, there must be opportunity; there must be observations made by the people generally.

I have given to you these several propositions. You are required before you can find the guilt of the defendant of either crime in the case to find it established to a certain extent.

There is another proposition that is important to dwell upon in this case, and that is in reference to the defendant going back to the place of the killing. I have already adverted to that; I have already told you that if he armed himself and went back there for the purpose of hunting Yates, and having an affray with him, prepared to take his life, or to engage in a deadly encounter, that there was no self-defence; that if
358 he knew there was deadly danger there, if he had reason to believe that Yates was there, and if he armed himself after two hours had passed, and went back there for the purpose of getting his pocket-book, it was a mission that he would have no right to perform at the time, although in the abstract, and in a peaceful condition, he would have a perfect right to go there for the purpose of getting his book, but if he had reason to believe that that would bring about a deadly conflict, or deadly act of violence, to be done by Yates upon him, it was his duty to avoid any search for that book at that time, to keep away from there, because the fact of going after the book was not a matter of such importance as to cause him to risk his life, or to risk the life of anybody else, that might be destroyed in an affray that ensued because he went to the place, and he could not set up the idea that he went there for that, provided he went there armed for a deadly conflict, and had reason to believe that a conflict might ensue, because he might meet Yates there. If he had reasons to believe that nothing of that kind would ensue, that everything was peaceful, everything was quiet, then he would have a right to go there to get his book, if that was what took him there. In passing upon that you are to pass upon the reasonableness of it; you are to pass upon it in the light of the evidence showing his previous preparation, in the light of the evidence showing his threats in the case, in the light of what ensued after he went to the place, and in the light of the evidence failing to show that
359 anybody was asked to make any search or anything of the kind for that book. All these things, whether coming from the defendant or anybody else, are to be passed on in the light of their reasonableness and their probability.

It becomes a matter of importance in this case to note what took this defendant back there, because it seriously affects him one way or another. It is for you to pass on that question, and you are to pass upon it in the light of the facts that are true, in the light of the facts that are reasonable,

in the light of the facts that are consistent, in the light of the facts you can depend on, and draw an honest and truthful conclusion from it. Now, that is the way you are to look at that circumstance, and it is a vital circumstance in the case. It requires your closest scrutiny. The law requires you should look at it in the light of all the surrounding facts in the case, in the light of all the surrounding evidence in the case. What I mean by this proposition that I have stated is, that if he went back to that place, to either one of these houses on the hill, it was his duty to have abstained from going there, if he went there for the purpose of having a deadly conflict. If he had good reason to believe from what had transpired before, and from a relation existing between himself and Yates, that a deadly conflict might ensue, he could not then justify himself in going to look for that book under such circumstances. If that condition did not exist he would have had a right to go there, in a peaceable way, to do a peaceful and lawful act. You are to be
360 satisfied beyond a reasonable doubt of the truth of this case. You are to be satisfied of it by all the evidence in the case, by all the facts and circumstances in the case.

The way to do to get at the correct result in a matter of this kind is to gather up all the facts that are accusatory, that go to show guilt, that tend to show guilt under the law; because that is a problem in which you and I are interested, whether there is guilt or innocence here; that is all we have to solve. All these facts that have that tendency are to be gathered up and weighed by you, and if their combined force is equal in proving power to one positive, uncontradicted, credible eye witness who would testify to these propositions that make the crime of murder or manslaughter, the case so far is proven, and it remains proven unless the other facts that are excusatory, that go to exculpate the defendant, are so far powerful in proving power as to do away with the facts that are accusatory, as to weaken them so a case is not proven beyond a reasonable doubt. All these circumstances, the conduct of the defendant before the killing, the conduct of Yates before the killing, the conduct of the defendant at the time of the killing, the conduct of Yates at the time of the killing, are material facts in the case. The conduct of the defendant after the killing is a matter that is important; you should look into it as a proving factor in the case; that is, the fact of the flight of the defendant. Now, the law contemplates that we all have a certain kind of human nature, which is largely made up of a desire to protect ourselves. If we are in the right when we kill a man, generally speaking, we are prompted from self interest, from our own desire to appear well with our fellow men, to seek
361 a vindication at once; to go, not where mobs may hang us or destroy our lives, but where honest and peaceful and law abiding and law loving citizens may pass upon our case as jurymen, and vindicate us before the world, saying we were right in doing what we did do.

That is human nature. It don't make any difference how much a man may be steeped in sin or how bad he may be; there is that still monitor in his heart, or his mind, that he can not silence. It is called his conscience. It is given to him to teach him the difference between right and wrong. When he is in the right it tells him so, and he consequently seeks to have other men believe as he knows to be the case, and when he is in the wrong his conscience reproves him and reprimands him, and it is upon this prin-

ciple that the law says to the jury that when a man has taken human life and flies from the jurisdiction that may try him, that may vindicate him if innocent or punish him if guilty, that that flight is evidence of guilt, unless he explains it in a satisfactory way. That is what the law says. It contemplates that if he flies he does so because he does not want a vindication. Therefore the law says that if he goes out of the jurisdiction or hides within the jurisdiction, so he can not be readily arrested, he becomes a fugitive from justice. He becomes one in contemplation of law, because of the consciousness of the act that he is doing, unless he explains it upon other grounds than that. Then your duty is to look at the evidence, to see whether these explanations are reasonable, whether they are consistent,

362 whether they are satisfactory, as offered in explanation of the conduct of the defendant in flying from the jurisdiction, because the proof shows that he was a fugitive from justice; that he was not under his correct name.

There is another fact in the case, the fact that he went to a distant State and assumed a name different from the one he was going under at the time that he killed Yates, and he is charged in the indictment under that name, when it is proven that his name is not Marshall, but Hall. The fact of his going to the State of Mississippi from the place where he had killed Yates, and taking his true name, is a circumstance that may be taken into account to show that he was seeking to avoid arrest. Unless he explains that, that you may attribute it to some other reason, the fact of his leaving the country where his case could not be presented to a jury until the time or the moment that he may choose to have it presented, is a fact to be taken into account by you, because a man can not do that; if he absents himself, if he conceals himself until the proper moment, in his judgment, arrives when witnesses may be out of the way, he is a fugitive from justice, and the presumption is against him, as well as in the case where he flees for all time and is out of the way for all time.

Then your duty, I say, is to take into consideration all these facts. If, from the whole of them, you are satisfied that crime exists, it is your duty to correctly name that crime. The propositions in this case do not have to be demonstrated or proven to you beyond all cavil, conjecture, or doubt, the law says, because it is impossible to do that, and it says we are not expected to do impossibilities. It says if we can arrive at results that are reasonable, as reasonable men arrive at them, with a reasonable degree of certainty, we must do it.

363 If all the facts and all the circumstances in the case are equal in proving power to the testimony of one positive, uncontradicted, credible eye witness, the case is then established, and established beyond a reasonable doubt. If it is not proven to that degree of certainty, it does not amount to proof beyond a reasonable doubt, and the case would be in that state of doubt that we would regard and act upon. If it is established to that degree it is established to a moral certainty, and it is established so we are to believe it. That means that high degree of certainty that ordinarily satisfies a reasonable mind, the mind of a reasonable citizen. If proven that way, men ordinarily act upon it, and they believe in the truth of it, and what they may ordinarily do as reasonable men they are authorized to do when in the jury box, as such reasonable men. Then when it is proven that way, the law considers that it is proven so that there is not in the case or

confronting the case a doubt for which a good reason can be given. All other kinds of doubts are to be disregarded. All other kinds of skeptical conclusions are to be set aside. There is to be no attention paid by the jury to conjectures. The only kind of a doubt that you can consider, is a real, substantial doubt of guilt, that flows naturally and reasonably to your minds from the testimony in the case, leaving them in a condition where you are not able to say that you have an abiding conviction, to a moral certainty—that is, to a high degree of certainty—of the truth of the charge. When it is proven that way, it is established. When the converse of that state of case exists, it would necessarily be a state of reasonable doubt. If you find
364 that crime exists in the case, as I have already told you, the duty is two fold upon you. It is to find the crime, and then to correctly characterize it, correctly name it. If you find that crime exists, and you incorrecty name it, the mistake in that regard is as serious as though you failed to say that crime existed, or to say that crime existed when it does not exist. Your duty, then, is first to find if a crime exists, and then to characterize that crime with its proper name under the law, and when you have done that you have performed your duty. If the proof does not show that a crime exists, of course you would say that the act was an act that was excusable under the law. If you find that state of case to exist, you say so by your verdict. If you find him guilty, you say "We, the jury, find him guilty as charged in the indictment," of whatever crime you may find him guilty of. If you find him not guilty, you declare that finding by saying, "We, the jury, find the defendant not guilty as charged in the indictment.

The case is submitted to you for your consideration, deliberation, and determination.

Verdict: Guilty of murder. (12:20, p. m.)

365 The court charged the jury, among other things, as follows:

"The only method of protection outside of resorting to circumstantial evedence in every case where a human life has been taken is by the shotgun and the Winchester and the pistol, because you can not get at this essential element of the crime of murder by any other means than by the light of circumstantial evedence, and if you ignore it, if you disregard it, then there is no enforcement of the law; we are powerless, and we are in anarchy; we are at the mercy of the lawless, the desperate, and the wicked, and they are our autocrats and our rulers. We must depend upon this character of evidence. The law authorizes us to depend upon it, because it says whatever is legal evidence may be sufficient evidence, provided there is enough of it to establish the facts in the case, and this circumstantial evidence is legal evidence and we are therefore to look to it, and look at the case by the light of this sort of evidence."

To the giving of which instructions the defendant at the time excepted. The court also charged the jury, among other things, as follows:

"The other condition that we have named is that of self-defense, which gives the right to kill, to take a human life; it is that condition which the law says from necessity the individual is put in an attitude of not only being judge of the law, but of being executioner of it, and practically and really at the same time he is acting as judge and jury and executioner all at the same time. He is judge of what the law says, though not sworn

to do so. He finds what the facts are, though not sworn to try the case according to the law and the evidence. He makes an application
366 of the law to the facts, and he finds a verdict, and he enters up a judgment, and there and then, all at the same time, executes that judgment and takes a human life. Now, that he may be permitted to discharge that responsibility, or that condition of things that rests upon him properly, his conduct must be viewed in the light of the law giving him the right to act in this double capacity. In other words, he is not to use this law as a shield or covering for a state of case that does not come within it. If the case comes within it he is entitled to the provisions of the law for his protection. If the case is outside of it by the terms of the law, then he can not stretch it in order to cover his case. He must stand within the purview of the law or he can not be benefited by it." The defendant at the time excepted to this charge.

The court also, among other things, charged the jury as follows:

"But the man who acts so as to take human life—to do that thing which is the most serious thing of all others, and it entails the most serious effects upon society if it is done wrongfully—the man who, I say, is so situated when deliberating upon the law applicable to him and to the facts of that case, and in making and application of the law to them, and in finding a verdict, and in entering a judgment on the death of the man before it could be written out and promulgated or proclaimed—the man is in a condition of mind different to yourselves. You are the arbiters as to whether he had a right to invoke the law of self-defense."

To the giving of which charge the defendant at the time excepted.

The court, among other things, instructed the jury as follows:

367 "Now, the phrase commanding him to retreat as far as he can contemplates that he should avoid the difficulty. If he is away from where the danger is, although it may exist, if it has an existence, and he is out of the way of it, his duty is to keep out of the reach of it; his duty is to keep away from it, and not to hunt it up, not to seek it. If his adversary is at a place and he knows if he goes there there will be danger to his life, his duty is to avoid that place, although as a general proposition of the law he has a right to do what the law permits him to do. In this case the defendant had a right to hunt for this book if it is true that he had lost his book there, but if he knew there was deadly danger there, if he knew there was a probability of getting into an affray there with his adversary with whom he had had a difficulty, it was his duty to keep away from there at that time, and under such circumstances he would have had no right to go there, even to hunt for his pocketbook, because I say a higher duty as affecting him would spring into existence—the higher duty as affecting him from the standpoint of self-interest, self-protection. If he contemplated there was deadly danger there, or danger of a difficulty, the duty to himself commanded him to avoid that condition, because he might lose his own life in it; self-duty commanded him to abstain from it, and it is his duty to his adversary and to the public to do so in such a case. We are all vitally interested in the protection of human life. It is a public injury that is sought to be redressed; it is a public crime that is to be correctly defined and correctly pronounced by the jury, and it is not to be pronounced in any bending or cringing way to suit the

circumstances because the man killed may not have squared his life
368 with the rule of uprightness and morality, but is to be pronounced in exact accordance with the mandates of the law."

To the giving of which instructions the defendant at the time excepted.

The court further charged the jury as follows:

"Now, when that state of case exists it not only shows a state of case, as I have already told you, that is murder, but it shows one from which is entirely banished the law of self-defense, and there is no self-defense in it, no matter what the adversary slain may do. When a party goes to the place where the slain person is with a deadly weapon for the purpose of provoking a difficulty, or with intent of having an affray—because this law of self-defense commands a man to avoid the deadly danger if it is existing whenever he can do it with due regard to his own safety—and if he arms himself with a deadly weapon and goes to the place for the purpose of using that deadly weapon or with the purpose of having an affray when he gets there, if opportunity offers when he can use it, instead of seeking to avoid the necessity of taking life, he is creating a state of case where he can not take human life by an act of violence if occasion offers, and the law banishes from him the right of self-defense, no matter what the adversary may do in the affray generate by his act."

To the giving of which instructions the defendant at the time excepted.

The court instructed the jury, among other things, as follows:

"The defendant goes on the stand. He makes statements before you under oath. They are to be viewed in the light of the other facts in the case. If the other evidence that is truthful corroborates what he
369 says you have a right to consider his evidence as strengthened by evidence of that character, but if the other evidence that is true contradicts what he says, it is your duty to consider his evidence weakened just as you may attach credit to the contradicting facts. He makes his statement, surrounded by self-interest and consequently you may presume that what he says is prompted by motive on his part. He stands before you having the strongest motive that a man can ever have in this life to make statements favorable to himself, the strongest motive that any of us can have, and I doubt that there is a man living, or a man that is purely mortal that was ever created who could resist the temptation to so act as to protect himself when so situated. Human nature is of that character."

To which charge of the court the defendant at the time excepted.

The court also, among other things, charged the jury as follows:

"There is another proposition that is important to dwell upon in this case, and that is in reference to the defendant going back to the place of the killing. I have already adverted to that; I have already told you that if he armed himself and went back there for the purpose of hunting Yates and having an affray with him prepared to take his life, or to engage in a deadly encounter, that there was no self-defense; that if he knew there was deadly danger there; if he had reason to believe that Yates was there, and if he armed himself after two hours had passed and went back there for the purpose of getting his pocketbook, it was a mission that he would have no right to perform at the time, although, in the abstract, and in a peaceful condition, he would have a perfect right to go there for the
370 purpose of getting his book. But if he had reason to believe that that would bring about a deadly conflict or deadly act of violence

to be done by Yates upon him, it was his duty to avoid any search for that book at that time, to keep away from there, because the fact of going after the book was not a matter of such importance as to cause him to risk his life or to risk the life of anybody else, that might be destroyed in an affray that ensued because he went to the place, and he could not set up the idea that he went there for that, provided he went there armed for a deadly conflict, and had reason to believe that a conflict might ensue because he might meet Yates there. If he had reasons to believe that nothing of that kind would ensue, that everything was peaceful, everything was quiet, then he would have a right to go there to get his book, if that was what took him there."

To the giving of this instruction the defendant at the time excepted.

The court also further instructed the jury as follows:

"Now the law contemplates that we all have a certain kind of human nature, which is largely made up of a desire to protect ourselves. If we are in the right when we kill a man, generally speaking, we are prompted from self-interest, from our own desire to appear well with our fellow-men, to seek a vindication at once; to go, not where mobs may hang us or destroy our lives, but where honest and peaceful and law-abiding and law-loving citizens may pass upon our case as jurymen and vindicate us before the world, saying we were right in doing what we did do. That is human nature. It don't make any difference how much a man may be steeped in sin, how bad he may be, there is that still monitor in his heart, or his mind, that he cannot silence; it is called his conscience. It is given to
371 him to teach him the difference between right and wrong. When he is in the right it tells him so, and he consequently seeks to have other men believe as he knows to be the case, and when he is in the wrong his conscience reproves him and reprimands him, and it is upon this principle that the law says to the jury that when a man has taken human life and flies from the jurisdiction that may try him, that may vindicate him if innocent, or punish him if guilty, that that flight is evidence of guilt, unless he explains it in a satisfactory way. That is what the law says. It contemplates that if he flies he does so because he does not want a vindication, therefore the law says that if he goes out of the jurisdiction or hides within the jurisdiction so that he can not be readily arrested, he becomes a fugitive from justice."

To the giving of which instructions the defendant at the time excepted.

The jury returned the following verdict:

"We, the jury, find the defendant guilty of murder, as charged in the within indictment."

(Signed) THOS. CAUTHRON,
Foreman.

The defendant then filed his motion for a new trial:

Now comes the defendant, R. M. Hall, and moves the court to set aside the verdict in this case and grant him a new trial, and for causes of motion he assigns the following:

1st. Because the court erred in overruling defendant' application for a postponement of the trial.

2nd. Because the court erred in admitting incomplete evidence to go to the jury.

3rd. Because the court erred in permitting the district attorney
372 over the objection of the defendant to comment upon and state to the jury that defendant had murdered a negro in the State of Mississippi, and arguing, in effect, that a trial and acquittal there of a white man for the killing of a negro was a farce.

4th. Because the verdict of the jury is contrary to the evidence in the case.

5th. Because the verdict is contrary to the law.

6th. Because the court erred in charging the law to the jury.

7th. Because the court erred in charging the jury that the defendant's flight was evidence of guilt.

8th. Because the court erred in commenting to the jury on the weight of the evidence.

And for other good and sufficient reasons.

R. M. HALL, *Deft.*
FREDERICK & RUTHERFORD,
Attys. for Deft.

Which said motion was by the court overruled, and in overruling the same made the following remarks:

373 In the circuit court of the United States within and for the western district of Arkansas, August term A. D. 1892.

UNITED STATES
vs.
ROBERT MARSHALL HALL. } Murder.

Ruling of the court on motion for new trial.—Delivered September 15th, 1892, 10:00 o'clock a. m.

PARKER, J.

The first cause as set out in the motion for a new trial in this case is—"Because the court erred in overruling defendant's application for a postpon'ment of the trial."

This case was set for trial July 28th, 1892. The application for the witnesses Jesse Trout and William Foreman, after having been once refused by Judge Williams, who was on the bench at that time, was allowed by the judge sitting in the case at the time it was presented, July 27th, 1892. This subpœna was returned August 1st, 1892, not served, and the officer in his return stated that the witnesses could not be found in South McAlester or that part of the country. Under the rules of practice in this court, the case was due for trial at any time from July 28th, 1892, to August 13th, 1892, the day it was called. Upon the very day it was called the defendant applied for a continuance or postponement of the trial
374 because of the witnesses not found, and especially of the absence of the witness, Jesse Trout. The court refused the application for a continuance, but as the defendant alleged in the application that the witness, Jesse Trout, lived at Coalgate, when in his former application he alalleged that both witnesses lived at South McAlester, it ordered a subpœna for them, and that subpœna was returned non est by the officer and by the statement in the subpœna that this witness had gone to Texas.

The defendant should not have waited from the first of August, the day upon which the first subpœna was returned, to the 13th of August. He should not have been instrumental in keeping witnesses upon the part of the Government, and all of the witnesses upon part of the defense, here for 12 days at a dollar and a half a day to be paid by the Government of the United States, but he should have taken some steps to ascertain whether this witness Jesse Trout could be found. He could have taken some steps to get the witness. He could have exercised some degree of diligence in that direction. This should be exacted in this court above all others because of the condition of things, and of the great expense in keeping a large number of witnesses in the case here for a long time, and for the convenience of these witnesses and these people who attend upon the court they should not be kept waiting here when it is in the power of parties to make greater preparation than they do make in cases. But the returns of the officer show the witness was not in this jurisdiction. There was no error in my judgment here. The defendant admits by his second allegation as to the whereabouts of the witness that the statement of the officer that she could not be found in South McAlester was correct. That strengthens the statement of the officer that he went to Coalgate
375 after the witness, but that she could not be found. Now, after the length of time that had elapsed after the abundant time that was offered the defendant to get this witnesses Jesse Trout in the jurisdiction of this court, there is certainly no legal objection upon the part of the court refusing the application for a continuance.

The second ground for a new trial as set out in the motion is:

"Because the court erred in admitting incompetent evidence to go to the jury."

That is not pointed out. I am not advised as to what is meant by that objection. I suppose the objection will show on the record.

The third ground for a new trial as set out in the motion is:

"Because the court erred in permitting the district attorney, over the objection of the defendant, to comment upon and state to the jury that defendant had murdered a man in the State of Mississippi, and arguing in effect that a trial and an acquittal there of a white man for the killing of a negro was a farce."

That was an objection made to a statement made by the district attorney. My recollection of the matter is that that statement as here set out is substantially correct, with the exception that he used the word "killed" instead of "murdered." Now, the question is, whether that was such an error, if error at all, as that the court should reverse the finding of the jury upon it. I have not the least idea that it had the remotest influence upon the mind of the jurors one way or another. I do not want the appel'ate court to look at this case as if there was any invocation of some political status to influence the jury. If there is a political condition in this country that supports the killing of men, or that upholds a system of that kind, I hope it is in a very weak condition. I am sure there
376 is no political condition that can be truthfully asserted by any one at any time that has ever had any influence in this court. I do not say it with any degree of egotism, but I do assert that as far as the administration of justice is concerned the politics of people are left outside the door of the court house, I hope. Now, it is important, in order that

the appellate court shall see this cause as it really stands, that the court should state exactly how this proposition came into this case.

Testimony has been introduced by the defendant sustaining his character as a peaceable, law-abiding man. A witness had been offered by the defense for that purpose, and he had testified as to the character of the defendant being of that kind, and the district attorney on cross-examination by way of testing the ability of the witness to pronounce upon good character or bad character, as the case might be, asked the witness if he had heard that the defendant had killed a negro in Mississippi. He said that he had, and I believe, though I am not clear upon that, that he asked him further the question if he had not heard that the defendant was indicted for that. When the defendant came on the stand he was asked by his counsel the question as to whether or not that was true, and he said it was, and he was then asked the question if he hadn't been acquitted for it, and he answered without objection that he had. Of course if that had been objected to it may have been excluded because it should have been proven by the record, but it was not objected to, and he answered that he had been acquitted. Now that is the foundation of the comment. The evidence was admissible in the first place, in my judgment, solely upon the ground that it was a condition that might necessarily be brought out by the examination of the witness as to the general character of the
377 defendant, because the party on cross-examination has the right to test the ability of that witness, and to test his opinion of what character is. It may be that a man in the face of having killed another may be a man of good character, but this question at least is pertinent and proper of inquiry, and I do not think there was anything improper in arguing the question on either side. Now, this comment was made by the district attorney, that the acquittal of a man for killing a negro was a farce substantially; I don't know whether that was the language or not. Now, it is quite common and quite proper for counsel in argument of a case to allude in that argument to facts that are regarded as historical facts, or facts that are noted as existing, and generally recognized by everybody. Mr. Thompson, in his work on Trials, Vol. 1, 770, says:

"It is unquestionably a sound rule that historical facts, of which courts take judicial notice, may be alluded to in argument for the purposes of illustration, and this rule has been extended, on doubtful grounds, so far as to justify a State's counsel, in a criminal trial, in alluding to other historical cases," etc.

Now, I think the fact, as claimed by the district attorney, is a historical fact in this country. I am not going to comment upon that one way or the other. The district attorney asserted incidentally in his argument by way of weakening the effect of the evidence given by the defendant showing his acquittal the condition existing in that country, that an acquittal could be obtained without merits, claiming, of course, that that was a historical condition. I am not prepared to dispute that; and I was very forcibly struck with the argument of counsel, Mr. Frederick, in alluding to the proposition, that it was objectionable because it was hostorical. That is why he objected to it. It is too much historical,
378 that in the courts of this country there creeps in these prejudices against nationality sometimes, and not only in the courts, but outside of the courts, as was exhibited but a short time ago down here in a

neighboring State of ours, where people imprisoned in a dungeon, and chained to the walls of that dungeon, held there in manacles, helpless and unarmed, with a great, surging, rushing, maddened, and infuriated crowd going in upon them and shooting them to death one by one, while they were pleading not to these demons, but to the God of mercy. That is historical. I say it may be truthfully asserted that when a great prominent fact like that stands out in this country, where a prejudice against race or nationality so asserts itself that the decrees and judgments of courts are perverted by that condition, it is not an improper subject to be used by way of illustration by counsel in a case. I do not think any error was committed in permitting the district attorney to thus argue the case to the jury. I wish to heaven we could join our minds together and help to obliterate that condition that we know is a curse to our land wherever it exists, wherever mob violence exists, or wherever perverted justice exists in the courts, that endangers the rights of every citizen in the land; and it is the duty of all of us to assist in stamping it out in the courts and outside of it. I am not prepared to say that any possible injury could have arisen to the defendant by this allusion in that way that is conceived by counsel for defendant to be improper.

The fourth ground for a new trial, as set out in the motion, is:

"Because the verdict of the jury is contrary to the evidence in the case."

379 I am not prepared to assent to that proposition.

The fifth ground for a new trial, as set out in the motion, is:

"Because the verdict is contrary to the law."

I make the same assertion with regard to the fifth cause as I do in regard to the fourth cause.

The sixth ground for a new trial, as set out in the motion, is:

"Because the court erred in charging the law to the jury."

There is nothing pointed out here that is said to be objectionable, and I am not able to say what is meant by that particular objection. I do not think there is anything objectionable that can be considered as objectionable matter in the charge.

The seventh ground for a new trial, as set out in the motion, is:

"Because the court erred in charging the jury that the defendant's flight was evidence of guilt."

That does not correctly assert the proposition as charged by the court. The court does not put the proposition in that way to the jury, but puts it conditionally. If the defendant did not explain the flight on some other theory than that of a desire to flee from his trial it is to be taken as evidence against him. That is the way the proposition is put. That makes it very different. It would be hardly proper for a court to say absolutely that the flight was evidence of guilt without qualifying it. It is evidence of guilt unless it is attended by circumstances that are credible and which are believed by the jury to show that the defendant did not fly to escape the presentation of his case in a court of justice when the officers of that court might choose to present it. That is what the law says, and

380 it is strong evidence of it, and there can be no doubt of it. As a rule the strength of that evidence depends largely upon the circumstances and upon the condition of the country, and upon the familiarity of men with crime.

You may go to some of the older States of this Union where the law is better enforced than it is out here, because we have not the same means of enforcing it, and you take hundreds of men and if they should be unfortunate enough to kill a man in self-defense they would be so agitated they would perhaps flee the country, though the whole evidence was all in their favor. I say that the conditions have much to do with that. You take a man who is an inhabitant of this Indian country, who is familiar with acts of violence, who is made familiar with them because of their frequent occurrence, and he is a man who is not startled by an arrest; he is not the man whose mind and judgment are overcome by the conception that he may be tried for that offense; he is too familiar with this condition. And it could hardly be said that a man would flee because of fear of mob violence when he would know reasonably and naturally that he moght go to a place where the mob would have no right to touch him, and not be permitted to touch him. He could put himself in the hands of the law that would shield him, and when a man does take to flight, when he does leave the country precipitately and hastily, he is permitted by the law to give his reasons for thus leaving, and the jury weigh that fact together with the reason, just as they were told to do in this charge. They did weigh the reasons, undoubtedly, and evidently did not consider the reasons sufficient. That, of course, I am not conversant with,
381 because they may have found their verdict on the other facts. I do not believe that the propositions as given to the jury were incorrectly presented.

The eighth cause, as set out in the motion for a new trial, is:

"Because the court erred in commenting to the jury on the weight of the evidence."

In the case of U. S. v. Downing, which I have just passed upon, I have fully given the law on this subject. I do not believe that this charge contains what the law calls a comment upon the evidence. It simply told the jury what facts they might regard as evidence in the case, but it does not tell them what each and every fact proves, and that is what is known as a comment upon the evidence, but even if it had told them so it is doing what the court has a perfect right to do in the light of the authorities I read in the other case. And I do not find any error in the action of the court or the jury in this case.

The motion for a new trial will be overruled.

Mr. FREDERICK (of counsel for defense). Out of an abundance of precaution we will except to the ruling of the court on motion for a new trial.

382 To which ruling of the court the defendant at the time excepted.

To all of which rulings of the court the defendant at the time excepted and hereby tenders his bill of exceptions and prays that the same may be signed and made a part of the record in this case, which is accordingly done.

I. C. PARKER,
U. S. Dist. Judge holding Circuit Court.

(Endorsed on back.) United States vs. Robert Marshall Hall. Bill of exceptions. Filed Sept. 19, 1892. S. Wheeler, clerk, by I. M. Dodge, D. C.

383 *Assignment of errors.*

United States circuit court, western district of Arkansas. August term A. D. 1892.

UNITED STATES
vs.
ROBERT MARSHALL HALL. } Murder.

The defendant, Robert Marshall Hall, files this his assignment of errors committed on the trial of said cause.

1st. It was error to overrule the defendant's application for a postponement of the trial.

2nd. It was error to admit in evidence the "copy" of the writ of Judge Miles from the southern district of Mississippi.

3rd. It was error to permit the district attorney to ask the witness George Perry the following question: "Did that other man go up to Yates and get astraddle of him and take his pistol?"

4th. It was error to permit the district attorney to ask the witness George Perry the following question:

"I will ask you if you say that man was shooting out in this direction after Yates fell, went up to him, got astraddle of him take his money." Also the following:

"I will ask you if on the next morning you did not tell a man called Dad Depew and Burt Salmon and others perhaps who were—I don't know there were any others there or not—and Dad Yandle that when deceased left the house he started down the road, that you followed him, put your hand on his shoulder and begged him to come back, that you walked with him down the road until he came close to where defendant met him; that then he was fired upon, and that he was shot down and killed, perhaps firing a shot or two himself, that the forst ball went between your
384 legs; that you run, and that you finally saw the man who shot him, Marshall, this defendant, walk up to him, get astraddle of him and rob him of his pistol and his money."

5th. It was error to permit the district attorney to ask the witness, Robt. J. Abbott, on cross-examination, the following questions:

"You say the defendant's reputation for peace is good? Had you heard that he killed a 'nigger' in Mississippi?"

6th. It was error to permit the district attorney to ask the witness, B. F. Roberts, on cross-examination, the following question:

"And at the end of that time he (defendant) killed a man in a bawdy house in a fight, yet you say in that length of time (two months) you can know a man's reputation?" Also the following:

"Can a man make a reputation in two months' time? Is it not a thing that is built up little by little in your estimation? I want to get your idea of what reputation is. Do you think any man can establish a reputation in two months' time? What do you think about it? Had you heard that he had killed a negro in Mississippi; that he was a refugee from justice out there?"

7th. It was error to permit the district attorney to ask the witness, Ed. G. Sprague, on cross-examination, the following question:

"How many 'niggers' has a man got to kill, and how many knives has he got to carry in his shoe before he has got a good reputation?"

8th. It was error to permit the district attorney to ask his own witness, Bynum Colbert, the following question:

"If he (George Perry) made any statements to you about the killing of Yates, as to what was done from the time that Yates left the house until he was killed, I want you to state to the jury what he (George Perry) said."

385 9th. It was error to permit the district attorney to ask his own witness, Burt Salmon, the following questions and give the following answers:

"Do you know George Perry?" "Yes." "Big George, as he is sometimes called?" "Yes, sir." You stated in your examination in chief that when you first went up in the morning after the killing—early in the morning—to the body of Yates that you found George Perry, I believe?" "He was there about the time we got there." "Please state if, in the presence of yourself, your brother, John Salmon, and Dad Depew, he made any statements as to how the killing occurred the night before?"

"Me and Dad Depew, and John Salmon, and Jack Ellis, and George Williams went up there together." "You stated heretofore you went up there; I don't care for that; answer yes or no; did George Perry make a statement to you?" "Yes; he did make a statement in the presence of us." "What did he say?"

"The way it come up, some one said that Yates had been robbed, and George Perry said, 'If you catch Marshall (the defendant) you will find the man that robbed Yates.' He says, 'You will find a twenty-dollar gold piece on him.' George went on to state that him and the defendant, Marshall, here, were coming down the road."

"That George Perry and Yates were coming down the road?"

"Yes, sir; and the defendant, Marshall, here, was shooting—there is some little trees at the side of the road, and some boards where an old beer dive has been from the looks of the place. I did not see it there but I seen the old pieces of barrels and boxes, where they had been put up by somebody, two or three little trees there, and he said that Marshall

386 here shot, and the ball passed between his legs and he left Yates. Marshall shot him down and jumped straddle of him and unbuckled his belt and taken it off, or thrown it off and taken his money."

10th. It was error to permit the district attorney to ask his own witnesses, John Salmon and Dad Depew, same and like questions as those asked of the witness Burt Salmon.

11th. It was error to permit the district attorney in his closing argument to the jury to use the following language:

"We know what kind of trials they have in the State of Mississippi of a white man killing a negro. We know from reading the newspapers and magazines that such trials there are farces. We are not living in Egyptian darkness, but in the light of the 19th century. The defendant came from Mississippi with hands stained with the blood of a negro and went to the Indian country, and in less than four months had slain another man." And other like expressions and declarations that the killing of a negro in Mississippi for which the defendant had been tried and acquitted there was murder.

12th. It was error to charge the jury as follows:

"The only method of protection outside of resorting to circumstantial evidence in every case where human life has been taken is by the shot-

gun and Winchester and the pistol, because you can not get at this essential element of the crime of murder by any other means than by the light of circumstantial evidence, and if you ignore it, if you disregard it, there is no enforcement of the law. We are powerless, and we are in anarchy; we are at the mercy of the lawless, the desperate, and the wicked, and they are our rulers. We must depend upon this character of evidence.

387 The law authorizes us to depend upon it, because it says whatever is legal evidence may be sufficient provided there is enough of it to establish the facts in the case, and this circumstantial evidence is legal evidence, and we are authorized to look to it, and look at the case by the light of this sort of evidence."

13th. It was error to charge the jury as follows:

"The other condition that we have named is that of self-defense, which gives the right to kill—to take human life. It is that condition which the law says from necessity the individual is put in an attitude of not only being judge of the law, but being executioner of it, and practically and really at the time he is acting as judge and jury and executioner. He is judge of what the law says, though not sworn to do so. He finds what the facts are, though not sworn to try the case according to law and the evidence. He makes an application of the law to the facts and he finds a verdict and he enters up a judgment and then and there, all at the same time, executes that judgment and takes a human life. Now, that he may be permitted to discharge that responsibility, or that condition of things that rest upon him properly, his conduct must be viewed in the light of the law giving him the right to act in this double capacity. In other words, he is not to use this law as a shield or covering for a state of case that does not come within it. If the case comes within it he is entitled to the provisions of the law for his protection. If the case is outside of it by the terms of the law then he can not stretch it in order to cover his case. He must stand within the provisions of the law or he can not be benefitted by it."

14th. It was error to charge the jury the following:

388 "But the man who acts so as to take human life to do that thing which is the most serious thing of all others and it entails the most serious effects upon society if it is done wrongfully, the man, who I say, is so situated when deliberating the law applicable to him and to the facts of that case, and in making an application of the law to them and in finding a verdict and in entering a judgment on the death of the man before it could be written out and promulgated or proclaimed—the man is in a condition of mind different to yourselves—you are the arbiters as to whether he had a right to invoke the law of self-defense."

15th. It was error to charge the jury as follows:

"Now this phrase commanding him to retreat as far as he can, contemplates that he should avoid the difficulty. If he is away from where the danger is, although it may exist, if has an existence, and he is out of the way of it, his duty is to keep out of the reach of it, his duty is to keep away from it, and not to hunt it up, not to seek it. If his adversary is at a place, and he knows if he goes there there will be danger to his life, his duty is to avoid that place, although, as a general proposition of the law, he has a right to do what the law permits him to do. In this case, as an abstract proposition, the defendant had had a right to hunt for this

book *it* it is true that he had lost a book there; but if he knew there was deadly danger there; if he knew there was a probability of getting into an affray there with his adversary, with whom he had had difficulty, it was his duty to keep away from there at that time, and under such circumstances he would have no right to go there, even to hunt for his pocketbook, because, I say, a higher duty as affecting him would spring into existence, the higher duty as affecting him from
389 the standpoint of self-interest, self-protection, if he contemplated there was deadly danger there, or danger of a difficulty, the duty to himself commanded him to avoid that condition because he might lose his own life in it; self-duty commanded him to abstain from it, and it is his duty to his adversary and to the public to do so in such a case. We are all vitally interested in the protection of human life. It is a public injury that is sought to be redressed; it is a public crime that is to be correctly defined and correctly pronounced by the jury, and it is not to be pronounced in and bending or cringing way to suit the circumstances, because the man killed may not have squared his life with the rules of uprightness and morality, but it is to be pronounced in exact accordance with the mandates of the law."

16th. It was error to charge the jury as follows:

"Now when that state of case exists, it not only shows a state of case as I have already told you that is murder, but it shows one from which is entirely banished the law of self-defense, and there is no law of self-defense in it. No matter what the adversary slain may do, when a party goes to the place where the slain person is with a deadly weapon for the purpose of provoking a difficulty, or with the intent of having an affray, because this law of self-defense commands a man to avoid the deadly danger if it is existing, whenever he can do it with due regard to his own safety, and if he arms himself with a deadly weapon and goes to the place for the purpose of using that deadly weapon, or with the purpose of having an affray when he gets there if opportunity offers when can use it, instead of avoiding the necessity of taking life, he is creating a state of
390 case where he can not take human life by an act of violence if occasion offers, and the law banishes from him the right of self-defense, no matter what the adversary may do in the affray generated by his act."

17th. It was error to charge the jury as follows:

"The defendant goes on the stand. He makes statements before you under oath. They are to be viewed in the light of the other facts in the case. If the other evidence that is truthful corroborates what he says you have a right to consider his evidence as strengthened by evidence of that character, but if the other evidence that is true contradicts what he says, it is your duty to consider his evidence weakened just as you may attach credit to the contradictory facts. He makes his statement surrounded by self-interest, and consequently you may presume that what he says is prompted by motive upon his part. He stands before you having the strongest motive that a man can ever have in this life, to make statements favorable to himself, the strongest motive that any of us can have, and I doubt not that there is a man living or man that is purely mortal that was ever created who could resist the temptation to so act as to protect himself when so situated. Human nature is of that character."

18th. It was error to charge the jury as follows:

"There is another proposition that is important to dwell upon in this case, and that is in reference to the defendant going back to the place of the killing.

"I have already adverted to that. I have already told you that if he armed himself and went back there for the purpose of hunting Yates, and having an affray with him prepared to take his life, or to engage in a deadly encounter, that then there was no self-defense. That if he
391 knew there was deadly danger there, if he had reason to believe that Yates was there, and if he armed himself after two hours had passed and went back there for the purpose of getting his pocketbook, it was a mission that he would have no right to perform at the time, although in the abstract and in a peaceful condition he would have a perfect right to go there for the purpose of getting his book. But if he had reason to believe that that would bring about a deadly conflict or deadly act of violence to be done by Yates upon him it was his duty to avoid any search for that book at that time, to keep away from there, because the fact of going after the book was not a matter of such importance as to cause him to risk the life of anybody else, that might be destroyed in an affray that ensued because he went to the place and he could not set up the idea that he went there for that, provided he went there armed for a deadly conflict, and had reason to believe that a conflict might ensue, because he might meet Yates there. If he had reason to believe that nothing of that kind would ensue, that everything was peaceful, everything was quiet, then he would have a right to go there to get his book if that was what took him there."

19th. It was error to charge the jury as follows:

"Now the law contemplates that we all have a certain kind of human nature, which is largely made up of a desire to protect ourselves. If we are in the right when we kill a man, generally speaking, we are prompted from self-interest from our own desire to appear well with our fellow men to seek a vindication at once; to go, not where mobs may hang us, or destroy our lives, but where honest and peaceful and law-abiding and law-loving citizens may pass upon our case as jurymen and vindicate
392 us before the world saying we were right in doing what we did do. That is human nature. It don't make any difference how much a man may be steeped in sin or how bad he may be, there is that still monitor in his heart or his mind that he can not silence. It is called conscience. It is given to him to teach him the difference between right and wrong. When he is in the right it tells him so, and consequently seeks to have other men to believe as he knows to be the case, and when he is in the wrong his conscience reproves him and reprimands him, and it is upon this principle that the law says to the jury that when a man has taken human life and flies from the jurisdiction that may try him that that may vindicate him if innocent or punish him if guilty, that that flight is evidence of guilt unless he explains it in a satisfactory way. That is what the law says. It contemplates that if he flies he does so because he does not want a vindication, therefore the law says that if he goes out of the jurisdiction or hides within the jurisdiction so that he can not be readily arrested he becomes a fugitive from justice."

20th. It was error to overrule the defendant's motion for a new trial.

21st. It was error to sentence the defendant.

Wherefore, the above stated errors considered, the said defendant prays that the judgment and sentence against him be reversed and a new trial be granted him.

ROBERT MARSHALL HALL,
By FREDERICK & RUTHERFORD,
His Attorneys.

393 United States circuit court, western district of Arkansas, August term, 1892.

UNITED STATES
vs.
ROBERT MARSHALL HALL. } Murder.

I, Robt. Marshall Hall, the defendant in the above stated cause, do solemny swear that I am not possessed of sufficient means and am not worth $10.00 above my wearing apparrel, and am unable to procure the same so as to prosecute the appeal taken in said cause in the Supreme Court of the United States.

I therefore pray that it be prosecuted in forma pauperis.

ROBERT MARSHAL HALL.

Sworn to and subscribed before me this the 19th day of September, 1892.

STEPHEN WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

394 *Petition for writ of error.*

United States circuit court, western district of Arkansas, August term, 1892.

UNITED STATES
vs.
ROBT. MARSHALL HALL. } Murder.

To the clerk of the circuit court of the United States for the western district of Arkansas:

Your petitioner, Robt. Marshall Hall, represents that the August term, 1892, of said court he was convicted on an indictment charging him with the crime of murder and that the said court has pronounced judgment and sentence of death upon this petitioner of the jury convicting him as aforesaid; your petitioner alleges that in the record and proceeding in the trial in said cause there is great and manifest error to the prejudice and great damage of your petitioner.

He therefore prays that a writ of error from the Supreme Court of the United States be issued by you under the seal of said circuit court in said cause, removing said cause and the record therein to the said Supreme Court, in order that the same may be there examined, and if error be found that the judgment and sentence against him therein may be reversed.

ROBERT MARSHALL HALL,
By FREDERICK & RUTHERFORD,
His attorneys.

395 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Arkansas, greeting:

Because in the record and proceeding, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The United States of America and Robert M. Hall, a manifest error hath happened, to the great damage of the said Robert M. Hall, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceeding aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 21st day of Septr., in the year of our Lord one thousand eight hundred and ninety-two.

STEPHEN WHEELER,
Clerk of the Circuit Court of the United States
for the Western District of Arkansas.

Allowed by ——.

396 UNITED STATES OF AMERICA, ss:

The President of the United States to William H. H. Clayton, esq., United States attorney for the western district of Arkansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the western district of Arkansas, wherein Robert M. Hall is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Isaac C. Parker, judge of the district court of the United States this 21st day of Septr., in the year of our Lord one thousand eight hundred and ninety-two.

I. C. PARKER,
U. S. District Judge, holding Circuit Court.

On this day of , in the year of our Lord one thousand eight hundred and ninety- , personally appeared before me, the subscriber, and makes oath that he delivered a true copy of the within citation to

Sworn to and subscribed the A. D. 18 .

I, William H. H. Clayton, U. S. attorney for the western district of Arkansas, hereby accept service of the within citation this 21st day of Septr., 1892.

WILLIAM M. MELLETTE,
Asst. U. S. —, West. Dist. Ark.

397 UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States in and for the western district of Arkansas, do hereby certify that the foregoing is a true and correct transcript of the record in the case of the United States versus Robert Marshall Hall, convicted of murder at the August term, 1892.

[SEAL.]

STEPHEN WHEELER,
U. S. Circuit Clerk for Western Dist. of Ark.
By I. M DODGE,
Deputy Clerk.

(Indorsement on cover:) Case No. 15150. Term No. 1180. Robert M. Hall, plaintiff in error, *vs.* The United States. W. Arkansas, C. C. U. S. Filed September 29, 1892.

Office Supreme Court U
FILED.
OCT 4 1893
JAMES H. McKENNEY
CLERK

No 1180 822

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT HALL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

A. H. GARLAND,
Attorney for Plaintiff in Error.

J. M. CAIN, ARTIST PRINTER,, FT SMITH, ARK.

No 1180.

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT HALL, - - - P. E.

vs.

THE UNITED STATES.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

ABSTRACT.

On the night of the 4th day of August 1891, the Plaintiff in error, Robert M. Hall, shot and killed Jim Yates near South McAlister, Indian Territory.

He was indicted for murder in the United States Circuit court for the Western District of Arkansas, at the August term 1891.

Record Page 1.

On the 19th day of April 1892, and on July 27th, 1892, he made application to the court to allow witnesses for his defense. The court allowed them as asked for.

Record Page 2.

Among said witnesses for whom subpoenas were issu-

ed, was Jesse Trout, who was within the jurisdiction of the court. On the 13th day of August, 1892, the case was called for trial, when plaintiff in error, made and filed his motion for a continuance, on account of the absence of said witness, Jessie Trout, who was then within the jurisdiction of the court. Said motion is in words and figures as follows;

"Now comes the defendant, R. M. Hall, who is indicted for the murder of Jim Yates, and states to the court that he cannot safely go to the trial of this case, without the evidence and presence of Jessie Trout, for whom application has heretofore been made and allowed and subpoena issued. By Jessie Trout, defendant can show that on the night that Yates was killed, he, defendant, went to her house about 150 yards from the place where Yates had two hours before, beaten and kicked defendant; and that defendant came to her house and stated that he had lost his papers and book from his pocket where Yates had beaten him, and that he (defendant) was looking for said papers and book, and that he did not want to go back up where Yates had beaten and kicked him, till he, Yates, had gone and that she, witness, Jessie Trout, told him that Yates was gone, and that there would be no danger of meeting or seeing him then, and that he could safely go on up there to look for his papers. That, relying on what she, Jessie Trout, told him, he (defendant) started to go up to said house where Yates had beaten him, for the purpose of looking for his papers, and, not expecting to meet or see said Yates, and was met by Yates, who came toward him, firing his pistol at him (defendant) and shot this defend-

ant in the arm, and defendant then drew his pistol and fired at Yates, in self defense, and in order to save his own life. Defendant states that he can not prove these facts by any other witness who is in attendance on this court. That said Jessie Trout is not in attendance on this court. That she is within the jurisdiction of this court, as he is informed and believes, and that she can be found at Coal Gate in the Choctaw Nation; that she is not absent by his consent or procurement, that this application is made in good faith, that justice may be done him; that if this case is postponed he will use all diligence to procure her attendance at the next term of this court, or if possible, he will have her present at some future day of the present term; that he has used all reasonable diligence in his power to obtain her presence at this term. He states that the matters and things set forth in this application, as being within his own knowledge, are true, and those things not within his own personal knowledge, he believes to be true. [SIGNED] R. M. HALL.

Subscribed and sworn to before me this the 15th day of Aug. '92. STEPHEN WHEELER, Clerk.

Record page 6. By I. M. DODGE, D. C.

The court overruled this motion, and defendant at the time excepted.

Record page 9.

The plaintiff in error was then forced to go into the trial of the case, and the evidence, which is quite voluminous, developed substantially, the following facts:

Robt. M. Hall was a young white man, and about 23 years of age at the time of the homicide.

Record Page 151.

He was keeping a grocery store in the town of South McAlister. He was a peaceable young man of good moral character.

Record page 127.

The deceased, Jim Yates, was a deputy United States marshall for the court at South McAlister, I. T., and a man of brutal instincts, a drunkard and a gambler and a frequenter of houses of ill-fame and gambling dives.

Record pages 119, 125, 127, 143.

On the afternoon of the night of the killing, Jim Yates was lounging around the store of Hall, and had a quart bottle of whisky and got Hall to drink and tried to persuade Hall to go with him, that night to a place called "Chippy Hill,"—a place of prostitution, where was kept a beer dive and gambling den.

Record page 43.

Hall declined to go. A short while afterwards, Yates sent another gambler, a "pal" of his, called Mickey Free, to Hall, with a bottle of whisky and told him (Free) to get Hall to go to "Chippy Hill" that night, that Hall had money, and that he wanted it, and that he would have it, if he had to kill him, (Hall) to get it.

Record pages 52, 53, 54, 55.

After these persuasions aided by the whiskey they had induced Hall to drik, they got Hall to go with them to the dive on "Chippy Hill." While they were at this dive, Yates got Hall into a game of cards, and provoked a quarrel with Hall and knocked him down with his pistol, kicked him in the side, and fired his pistol off by Hall's

head, and cursed him till he, Yates was taken away by his "pals," and left Hall lying on the ground, at they supposed, dead. This was about mid-night.

Record Pape 43 to 55 of Free's Evidence.

After they had all gone back into the dive, Hall recovered consciousness, and arose and went back to his store, about a mile away, and washed the blood off himself and put on clean clothing, and in so doing, he discovered that he had lost. (where he had been knocked down and beaten by Yates,) his pocket-book containing valuable papers; which he carried in his hip pocket. Hall then got two pistols, and in about two hours afterwards he went back to the house of Jesse Trout, which was about 150 yards from the beer dive where he had been so foully beaten by Yates, and was told by Jesse Trout that Yates was gone and that he could safely go on and hunt for his papers and pocket book, and when he had gone about half way to the beer dive, he was met by Yates, who began firing on him and shot him, Hall, in the arm, whereupon Hall drew his pistol and returned the fire, shot and killed Yates. He went then to the house of Mrs Bullard near by and she gave him $1.50.

Record Pages 109 and 110.

Hall then left and went to his fathers home in the state of Mississippi.

Hall was convicted of murder, and filed his motion for a new trial which was by the court overruled.

Record page 217.

He thereupon took a bill of exception, and filed his as-

signment of errors and brought this case to this court, by writ of error.

There are twenty-one assignments of errors, viz:—

1. It was error for the court to overrule the defendants motion for a continuance of the case.

Record page 7.

2. It was error to admit in evidence, the copy of the writ of removal of Judge Niles of Mississippi.

Record page 42.

3. It was error to permit the district attorney to ask the witness, George Perry, the following questions:

Did the other man go up to Yates and get astraddle of him and take his pistol?"

Record page 93.

4. It was error to permit the district attorney to ask the witness, George Perry, the following questions:

"I will ask you if that man was shooting out in this direction, after Yates fell, went up to him, got astraddle of him and taken his money?"

Also the following:

"I will ask you, if on the next morning, you did not tell a man called Dad Depew, and Burt Salmon, and others perhaps who were—I don't know there were any others there or not—and Dad Yandle, that when deceased left the house he started down the road, that you followed him, put your hand on his shoulder and begged him to come back, that you walked with him down the road until he come close to where defendant met him; that, then he was fired upon, and that he was shot down and killed, perhaps firing a shot or two himself, that the first ball went be-

tween your legs; that you ran and that you finally saw the man who shot him, Marshall, this defendant, walk up to him, get astraddle of him and rob him of his pistol and his money."

Record pages 62 and 223.

5. It was error to permit the district attorney to ask the witness, Robt. J. Abbott, on cross-examination the following questions:

"You say the defendant's reputation for peace is good? Had you heard that he killid a 'nigger' in Mississippi?"

Record pages 119 and 223.

6. It was error to permit the district attorney to ask the witness, B. F. Roberts on cross examination, the following questions:

"And at the end of that time, he, defendant, killed a man in a bawdy house in a fight, yet you say in that length of time, 2 months, you can know a man's reputation." Also the following:—

"Can a man make a reputation in two month's time? Is it not a thing that is built up little by little, in your estimation? I want to get your idea of what a reputation is. Do you think any man can establish a reputation in two months time? What do you think about it? "Had you heard that he killed a negro in Mississippi; that he was a refugee from justice out there?"

Record Page 125 and 223.

7. It was error to permit the District Attorney to ask the witness, Ed G. Sprague, on cross-examination, the following questions:—

"How many niggers has a man got to kill, and how many

knives has he got to carry in his shoe, before he has got a good reputation?"

Record Pages 129, 130 and 223.

8. It was error to permit the district attorney to ask his own witness, Bynum Colbert, the following questions:

"If he, (Geo. Perry,) made any statement to you about the killing of Yates, as to what was done from the time Yates left the house until he was killed, I want you to state to the jury what he, (George Perry) said?"

Record pages 180, 181 and 224.

9. It was error to permit the district attorney to ask his own witness, Burt Salmon, the following questions, and give the following answers:—

"Do you know George Perry?" Yes," "Big George, as he is sometimes called?" Yes sir." "You stated in your examination in chief, that when you first went up in the morning after the killing—early in the morning—to the body of Yates that you found George Perry, I believe?"

"He was there about the time we got there."

"Please state if, in the presence of yourself, your brother, John Salmon, and Dad Depew, he made any statements as to how the killing occurred the night before?" "Me and Dad Depew, and John Salmon, and Jack Ellis, and George Williams went up there together."

"You stated heretofore you went up there; I don't care for that; answer yes or no; did George Perry make a statement to you?" "Yes, he did make a statement in the presence of us." "What did he say."

"The way it come up some one said that Yates had been robbed, and George Perry said, 'if you catch Marshal (the

defendant) you will find the man that robbed Yates.' He says, 'You will find a twenty dollar gold piece on him.' George went on to state that him and the defendant, here, were coming down the road."

"That George Perry and Yates were coming down the road?"

"Yes, sir; and the defendant, Marshal, here, was shooting—there is some little trees at the side of the road, and some boards, where an old beer dive has been from the looks of the place. I did not see it then, but I seen the old pieces of barrels and boxes, where they had been put up by somebody, two or three little trees there, and he said that Marshal here shot, and the ball passed between his legs and he left Yates. Marshal shot him down and jumped straddle of him and unbuckled his belt and taken it off, or threw it off and taken his money."

Record pages 181 and 224.

10. It was error to permit the district attorney to ask his own witnesses, John Salmon and Dad Depew, same and like questions a. those asked of the witness, Burt Salmon.

Record pages 181 and 224.

11. It was error to permit the district attorney, in his closing argument to the jury, to use the following language:—

"We know what kind of trials they have in the state of Mississippi of a white man for killing a negro."

"We know from reading the newspapers and magazines that such trials there are *farces*. We are not living in Egyptian darkness, but in the light of the 19th century.

The defendant came from Mississippi with hands stained with the blood of a negro, and went to the Indian country and in less than four months had slain another man."

And other like expressions and declarations, that the killing of a negro in Mississippi for which the defendant had been tried and acquitted there was murder.

Record pages 181 and 224.

12. It was error to charge the jury as follows:—

"The only method of protection outside of resorting to circumstantial evidence in every case where human life has been taken, is by the shot gun and Winchester and the pistol, because you can not get at this esential element of the crime of murder by any other means than by the light of circumstantial evidence, and if you ignore it, if you disregard it, there is no enforcement of the law. We are powerless, and we are in anarchy, we are at the mercy of the lawless, the desperate, and the wicked, and they are our rulers. We must depend upon it, because it says whatever is legal evidence may be sufficient, provided there is enough of it to establish the facts in the case, and this circumstantial evidence is legal evidence, and we are authorized to look to it and look at the case by the light of this sort of evidence."

Record pages 192 and 224.

13. It was error to charge the jury as follows:

"The other condition that we have named is that of self-defense, which gives the right to kill—to take human life. It is that condition which the law says from necessity the individual is put in an attitude of not only being judge of the law, but being executioner of it, and practi-

cally and really at the time, he is acting as judge and jury and executioner. He is judge of what the law says, though not sworn to do so. He finds what the facts are, though not sworn to try the case according to law and the evidence. He makes an application of the law to the facts and he finds a verdict and he enters up a judgment and takes a human life. Now, that he may be permitted to discharge that responsibility, or that condition of things that rest upon him properly, his conduct must be viewed in the light of the law giving him the right to act in this double capacity. In other words, he is not to use this law as a shield or covering for a state of case that does not come within it. If the case comes within it he is entitled to the provisions of the law for his protection. If the case is outside of it by the terms of the law then he can not stretch it in order to cover his case. He must stand within the provisions of the law or he can not be benefitted by it."

Record pages 196, 197 and 225.

14. It was error to charge the jury as follows:

"But the man who acts so as to take human life to do that thing which is the most serious thing of all others and it entails the most serious effects upon society it is done wrongfully, the man, who I say, is so situated when deliberating the law applicable to him and to the facts of that case, and in making an application of the law to them and in finding a verdict and in entering a judgment on the death of the man before it could be written out and promulgated or proclaimed—the man is in a condition of mind different to yourselves—you are the arbiters as to

whether he had a right to invoke the law of self-defense."

Record pages 197 and 225.

15. It was error to charge the jury as follows:

"Now this phrase commanding him to retreat as far as he can contemplates that he should avoid the difficulty. If he is away from where the danger is although it may exist it has an existance and he is out of the way of it, his duty is to keep out of the reach of it, his duty is to keep away from it, and not hunt it up, not to seek it. If his adversary is at a place, and he knows if he goes there, there will be danger to his life, his duty is to avoid that place, although, as a general proposition of the law, he has a right to do what the law permits him to do. In this case, as an abstract proposition, the defendant had a right to hunt for this book, if it is true that he had lost a book there; but if he knew there was deadly danger there; if he knew there was a probability of getting into an affray there with his adversary, with whom he had had a difficulty, it was his duty to keep away from there at that time, and under such circumstances he would have no right to go there, even to hunt for his pocket book, because I say, a higher duty as affecting him would spring into existence, the higher duty as affecting him from the standpoint of self-interest, self. protection, if he contemplated there was deadly danger there, or danger of a difficulty, the duty to himself commanded him to avoid that condition because he might loose his own life in it; self-duty commanded him. to abstain from it, and it is his duty to his adversary and to the public to do so in such a case. We are all vitally interested in the protection of human life. It is a public in-

jury that is sought to be redressed; it is a public crime that is to be correctly defined and pronounced by the jury, and it is not to be pronounced in a bending or cringing way to suit the circumstances, because the man killed may not have squarred his life with the rules of uprightness and morality, but it is to be pronounced in exact accordance with the mandates of the law."

Record pages 198 and 225.

16. It was error to charge the jury as follows:

"Now when that state of case exists, it not only shows a state of case as I have already told you that is murder, but it shows one from which is entirely banished the law of self-defence, and there is no law of self-defense in it. No matter what the adversary slain may do. When a party goes to the place where the slain person is with a deadly weapon for the purpose of provoking a difficulty, or with the intent of having an affray, because this law of self-defence commands a man to avoid the deadly danger if it is existing, whenever he can with due regard to his own safety, and if he arms himself with a deadly weapon and goes to the place for the purpose of using that deadly weapon, or with the purpose of having an affray when he gets there if opportunity offers, when he can use it instead of avoiding the necessity of taking life, he is creating a state of case where he can not take human life by an act of violence if occasion offers, and the law banishes from him the right of self-defense, no matter what the adversary may do in the affray generated by his act."

Record pages 201 and 226.

17. It was error to charge the jury as follows:

"The defendant goes on the stand. He makes statements before you under oath. They are to be viewed in the light of the other facts in the case. If the other evidence that is truthful corroborates what he says you have a right to consider his evidence as strengthened by evidence of that character, but if the other evidence that is true counteracts what he says, it is your duty to consider his evidence weakened just as you may attach credit to the contradictory facts. He makes his statement surrounded by self-interest, and consequently you may presume that what he says is prompted by motive upon his part. He stands before you having the strongest motive that a man can ever have in this life, to make statements favorable to himself, the strongest motive that any of us can have, and I doubt not that there is a man living or a man that is purely mortal that was ever created who could resist the temptation to so act as to protect himself when so situated. Human nature is of that character."

Record pages 209 and 226.

18. It was error to charge the jury as follows:

"There is another proposition that is important to dwell upon in this case, and that is in reference to the defendant's going back to the place of the killing. I have already adverted to that. I have already told you that if he armed himself and went back there for the purpose of hunting Yates, and having an affray with him purposed to take his life, or to engage in a deadly encounter that then there was no self-defense. That if he knew there was deadly danger there, if he had reason to believe that Yates was there, and if he armed himself *after two hours had*

passed and went back for the purpose of getting his pocket book, it was a mission he could have no right to perform at the time, although in the abstract and in a peaceful condition he would have a perfect right to go there for the purpose of getting his book. But if he had reason to believe that that would bring about a deadly conflict or deadly act of voilence to be done by Yates upon him it was his duty to avoid any search for that book at that time, to keep away from there, because the fact of going after the book was not a matter of such importance as to cause him to risk the life of anybody else, that might be destroyed in an affray that ensued because he went to the place and he could not set up the idea that he went there for that, provided he went there armed for a deadly conflict, and had reason to believe that a conflict might ensue, because he might meet Yates there. If he had reason to believe that nothing of that kind would ensue, that everything was peaceful, everything was quiet, then he would have a right to go there to get his book if that was what took him there."

Record pages 211 and 227.

19. It was error to charge the jury as follows:

"Now the law contemplates that we all have a certain kind of human nature which is largely made up of a desire to protect ourselves. If we are in the right when we kill a man, generally speaking, we are prompted from self-interest from our own desire to appear well with our fellow men to seek vindication at once; to go, not where mobs may hang us, or destroy our lives, but where honest and peaceful and law abiding and law loving citizens may pass upon our case as jurymen and vindicate us before the world say-

ing we were right in doing what we did do. That is human nature. It don't make any difference how much a man may be steeped in sin or how bad he may be, there is that still monitor in his heart or his mind that he can not silence. It is called conscience, It is given to teach him the difference between right and wrong. When he is in the right it tells him so, and consequently seeks to have other men to believe as he knows to be the case, and when he is in the wrong his conscience reproves him and reprimands him, and it is upon this principle that the law says to the jury that when a man has taken human life and flies from the jurisdiction that may try him, that may vindicate him if innocent or punish him if guilty, that flight is evidence of guilt unless he explains it in a satisfaciory way. That is what the law says. It contemplates that if he flies he does so because he does not want a vindication, therefore the law says that if he goes out of the jurisdiction or hides within the jurisdiction so that he can not be readily arrested he becomes a fugitive from justice."

Record pages 212 and 227.

The next two assignments are to the overruling defendants motion for new trial and to sentencing him, neither of which we apprehend will be under the rule of the court noticed.

ARGUMENT.

In the first place we contend that it was prejudicial error to overrule the defendant's motion for a continuance. The court upon a reading of this record will observe that it was a very material point in the case, as to why defend-

ant went back that night to the place of the killing. He could have proved by the absent witness, Jesse Trout, and by no other, that he was seeking to avoid a meeting with the deceased and was informed by her who had opportunity to know the fact, that deceased was gone, was not there, and that he could safely go back there to look for his pocket book. He was entitled under the law, for time in which to get that witness, and the court should have given him time. He had exercised diligence—all that he possibly could. The court will take judicial notice of the fact that the jurisdiction of the U. S. Circuit for the Western District of Arkansas, extends over a vast territory—a territory equal in area to several of the New England States. That witnesses must be often brought for a distance of several hundred miles. This state of case is unlike the ordinary jurisdiction in the state courts in which criminal trials are had. So therefore a few weeks in the court below are no more than a few days in a state court when a question of obtaining evidence is concerned. The court below conceded the materiality of the evidence asked for, but overruled the motion on the ground that diligence had not been exercised to obtain it. This was the first motion for a continuance. No necessary delay would have arisen. The defendant was in jail. This was the second week of court. Subpoena had been issued for the witness and was not served, although she was within the jurisdiction of the court. The defendant had done all he could do by having subpoena placed in the hands of the marshal. When he had done that much it was the duty of the marshal to serve the subpoena, and defendant can

not be held responsible for a dereliction of the duty on the part of the marshal. Therefore we submit that this was an error to the prejudice of the defendant, for which he should be granted a new trial.

9. Am. and En. Ency. of Law, page 654.

State vs. Lewis, 9 Mo. App 321.

As to the second assignment of error we make no comment.

As to the third assignment we think it was not admissible to allow the district attorney to ask his own witness George Perry leading questions.

As to the fourth ground upon which we rely for a reversal of this case we say that it was not permissible to allow the district attorney to ask the witness, Berry, as to what he may have told other persons as to how the homicide occurred. Such evidence was clearly hearsay.

Rice on Cr. Evidence, page 134.

2 Best Ev. Sec. 506.

State vs. Beandet, 53 com. 536.

The 5th, 6th and 7th, assignments of error may be considered together. The substance of these objections is, that the court permitted the district attorney to prove by asking questions of defendant's witnesses that defendant had killed a negro in the state of Mississippi. The effect of this proceeding was to show, that defendant had killed a negro and, therefore, he should be convicted, in this case-

for that killing. It practically amounted to trying him for both homicides at the same time. This evidence, no doubt, raised a prejudice in the minds of the jury, and had the effect to cause the jury to consider lightly the evidence in his behalf. The district attorney followed up this line of prosecution to the close of the trial, for in his closing argument to the jury, as shown in assignment No. 11, he reiterated and pressed it upon the jury, thrt the defendant should be convicted on this charge because he had killed a negro in Misiissippi.

Mr. Rice in his recent work on Criminal Evidence at page 218 and 157, says:

"*Evidence of other offenses should be* ~~continuously~~ cautiously *admitted.*"

It is a dangerous species of evidence, not only because it requires a defendant to meet and explain other acts than those charged against him, and for which he is on trial, but also because it may lead the jury to violate the great principle, that a party is not to be convicted of one crime, by proof that he is guilty of another. For this reason, it is essential to the rights of the accused that when such evidence is admitted, it should be carefully limited and guarded by instructions to the jury, so that its operations and effects may be confined to the single legitimate purpose for which it is competent.

Roscoe Crim. Ev. 90, 94.

Rex vs. Ball Russ. and R. 132.

Com. vs. Eastman 1 Cush 189, 48 Am. Dec. 596.

The case of Boyd vs. United States, decided Jan. 4th., 1892, and reported in Supreme Court Reporter in volume 12, at page 292, was a case, where two defendants were on trial for murder, and the court permitted evidence of several acts of robberies previously committed by the defendants.

Justice Harlan, in delivering the opinion of the court, among other things, said: "Whether Stanly robbed Brimson and Wade, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Danby. They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They offered no legal presumption or inference as to the particular crime charged. * * * * * * Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, etc."

If, as contended by the court below, that proof of the killing by defendant in Mississippi, was brought out to rebut evidence of defendant's good character, he should have so told the jury. But not a word fell from the lips of the learned court, to the jury, as to how they should consider this sort of evidence, but he let it go to the jury to be used by them as they might choose.

John Moulton vs. State of Ala., reported in 6th Lawyers Reporter at page 301, the court says:

"But this court has never held that it was proper, even on cross examination, to elicit the witnesses knowledge of the conduct or of particular acts of a defendant, or other person whose character is involved in the issue; but on the

contrary, its expressions are in perfect harmony with all the text-writers who touch on the point, and with an unbroken line of cases adjudged by courts of last resort and which are uniform to the effect that such evidence is incompetent and inadmissible."

Engleman vs. State, 2 Ind., 91.

Redmann vs. State, 1 Blackf, 96.

Com. vs. O'Brien, 191 Mass., 345.

Peterson vs. Morgan, 116 Mass. 350.

Gordon vs. State, 3 Iowa, 415.

State vs. Arnold, 12 Iowa, 187.

Reg. vs. Rowton, 10, Cox, Crim. Cos. 25.

Teese vs. Huntington, 64 U. S. 23.

Whart Cr. Ev. Sec. 61.

The 8th, 9th and 10th assignments are to the error of the court in permitting the district attorney to prove by the witnesses Colbert, Salmon and Depew what George Perry told them about the homicide. This evidence was clearly hearsay.

In 2nd. Best, Ev. § 506, under the head of of "*Res inter alios acta*," it is said: "No person is to be affected by the words or acts of others, unless he is connected with them, either personally or by those whom he represents, or by whom he is represented."

Rice on Cr. Ev. page, 133 and 134.

This witness, George Perry, was subpoenaed and sworn by the prosecution. His name was endorsed on back of the indictment.

The 11th assignment is as to the error of the court in permitting the district attorney in his closing argument to the jury to make the following declaration:

"We know what kind of trials they have in the state of Mississippi, of a white man for killing a negro. We know from reading the newspapers and magazines that such trials there are *farces*. We are not living in Egyptian darkness, but in the light of the 19th century. The defendant came from Mississippi with his hands stained with the blood of a negro, and went to the Indian country and in less than four months had slain another man."

This was promptly objected to by the defendant but the court overruled the objection. The defendant was not on trial for a murder committed in Mississippi, yet the court permitted the district attorney to hold it before the jury as a potent fact in the case. The jury well remembered that the court permitted the district attorney to prove that defendant had killed a negro in Mississipi. In other words, the defendant is a very bad man, and as a proof of it, he killed a negro in Mississippi, and the fact that he had been acquitted in that state is no argument that he is not guilty, because a trial in the courts of Mississippi of a white man for killing a negro are farces. Such language might be admissible in a political meeting where the purpose was to sway the minds of men by prejudice and passion growing out of race antipathy, but we submit

that it was highly improper in a court of justice where nothing but law and evidence should be considered.

The case of Sasse vs. State decided by the Supreme Court of Wisconsin 58 Am. R. page 649. is a case as to improper remarks by the district attorney and is very much like this. In that case the district attorney said:

"The defendant committed a crime in the old country, in Germany, and he fled from justice. He engaged passage on one ship and then on another. He landed in this country and went to Philadelphia, committing a crime there. He admitted that he knocked a hole in a man's head in the old country, and by his admission fled and committed a crime on one of the citizens of this country."

This language was objected to by the defendant and the trial court endeavored to cure the error by a charge to the jury. But the Supreme Court after an exhaustive review of the authorities, decided that the remarks prejudiced the minds of the jury and for that reason alone reversed the judgment and granted a new trial.

In Brown vs. Swineford 44, Wis. 282, C. J. Ryan said:

"It is sufficient that extra professional statements of counsel may gravely prejudice the jury and affect the verdict."

Citing Tucker vs. Henniker, 4 N. H., 317.

State vs Smith, 75 N. C. 306.

Ferguson vs State, 49 Ind. 33.

See also as to the same point.

Newton vs State, 21 Fla., 53.

State vs Underwood, 77 N. C. 502.

Combs vs State 75 Ind. 221.

People vs Baker, (Sup) 17 *N. Y. S.* 16.

People vs Ah Len 28 Pac. Rep, 286.

Fuller vs State 17 S. W. Rep. 1108.

Rice on criminal evidence at page 184 says:

"The over nourished zeal of counsel displayed in attempts to secure conviction for crime, frequently calls for condemnation on the part of the appellate court, especially when in the closing argument to the jury the attorney for the state travels outside the evidence for his facts or indulges in truculent abuse of the accused."

Citing Smith *vs People,* 8 *Cole* 457.

State *vs Hannet,* 54 *Vt.* 83.

Garlitz vs State, 71 *Md.* 193.

Martin vs State, 63 *Miss.* 505.

Perkins vs Guy, 55 *Miss.* 153.

Cavanah vs State, 36 *Miss.* 299.

In the 12th assignment of error we think the court gave unnecessary prominence to circumstantial evidence when he told the jury that the only method of protection outside of such evidence "in every case where human life has been taken is by the shot gun, winchester and pistol." The only effect of such a charge, even though it were law, is to cause the jury to give such evidence an overdue pro-

bative force in proving any given proposition, for this reason we submit this charge is erroneous.

The 13th and 14th assignments of error may be read and considered together. In these two assignments the court told the jury that when a man acted in self-defense he was acting as judge, jury and executioner all at the same time. He further says: "He is judge of what the law says, though not sworn to do so. He finds what the facts are, though not sworn to try the case according to the law and the evidence. He makes an application of the law to the facts and he finds a verdict and he enter up a judgment and then and there, all at the same time executes that judgment and takes a human life." Now such is not the law. The law does not require a man, in acting in self-defense to deliberate as a judge and jury. "The rule of law, founded on justice and reason, is, that *actus non facit reum nisi mens sit rea* —the guilt of the accused must depend upon the circumstances *as they appear to him.*"

6th Edition Whart. Cr. Law, Sec. 1027.

9 Am. and Eng. En. Law, p 596.

The circumstances under which a man, acting in self-defense, must be considered by the jury as they appeared to the defendant, not as they appear to a man acting coolly and dispassionately as a judge or jury.

"The true questions for the jury to determine were whether *defendant* believed he was in such imminent danger of his life, or of serious bodily harm, as to require taking the life of his assailant, and whether the circumstances were such as to justify that belief in the mind of a person

of ordinary fairness and reason."

State vs Wyse, 33 S. Car. 582.

Mr. Wharton in his article entitled "Fear; Its Legal Limitations."

15 Cent. L. J. 262 *treats this subject fully.*

In the 15th assignment of error the court told the jury substantially, that looking to the whole case, the defendant was cut off from the right of self-defense. That "in this case the defendant had a right to hunt for his pocket book, but if he knew there was deadly danger there, if he knew there was a probability of getting into an affray there with his adversary with whom he had had a difficulty, it was his duty to keep away from there at that time, and under such circumstances he would have had no right to go there, even to hunt his pocket book."

The court further charged the jury, as set out in the 16th assignment of error, that if defendant went back to the place of killing armed with a deadly weapon * * * with the purpose of having an affray * * * * that the law banishes from him the right of self-defense no matter what what the adversary may do in the affray generated by his act."

And again in the 18th assignment of error the court emphasizes this point and says:

"I have already told you that if he armed himself and went back there for the purpose of hunting Yates, and having an affray with him prepared to take his life, or to engage in a deadly encounter, that there was no self-defense."

Then in order to cut off all idea of escape for the defendant upon any phase of the evidence he proceeds to say:

"That if he knew there was deadly danger there, if he had reason to believe that Yates was there, and if he armed himself *after two hours had passed* and went back there for the *purpose of getting his pocket book*, it was a mission that he would have no right to perform *at that time*. Then we ask if he had no right to go after the lapse of two hours how long does the law require him to wait? Yates did not live there—had no home there. Defendant had been told that he was gone and consequently did not expect to see or meet him there, then why had not the defendant a right after two hours to go back there to look for his pocket book?

In the 6th (supplement) Vol. Cr. Defenses at page 172, we find the case of Crane vs. Commonwealth, a case from Kentucky Court of Appeals, which is a case very similar to the case at bar. Crane sought deceased with intent to do him bodily injury, but before the conflict he abandoned the intent and was endeavoring to avoid a difficulty. The trial court charged the jury, "that if defendant brought about the *meeting* with deceased for the 'purpose of killing or chastising him, then he could not be acquitted on the ground of self-defense, though he was in imminent danger of great bodily harm." This was held error.

In State vs. Steltz 97 Mo. 20, the following instruction to the jury was also held error:

"If defendant brought on the difficulty, terminating in homicide by his own willful and unlawful act, or of his own free will and inclination, he could not set up a plea of self defense, no matter how imminent his peril."

See also State vs Cullen 82 *Mo.* 623,

The following instructions to the jury was held erroneous:

"If the defendant himself brought on the fight and went into it armed he cannot justify the killing of his adversary."

A charge that no man can bring on a dangerous conflict, slay his antagonist and then justify on the ground of self-defese," states the rule too broadly and tends to mislead.

17 Texas App. 50.

Allen vs Com. 86 Ky. 642.

The theory of the defense was that defendant went back to the place of killing for the purpose of looking for his pocket-book and he was entitled to an instruction to the jury that if he went back there for that purpose and was attacked by Yates with a deadly weapon, as the proof shows he was, that he had a right to kill Yates under the law of self-defense. He was not the provoker of the difficulty. He was met by the deceased and fired upon and wounded by the deceased before he fired, and his shooting deceased under those circumstances was clearly in self-defense and the court should so have told the jury.

Harrison vs. State 43 *Vt.* 418.

State vs. Sloan 47 *Mo.* 604.

State vs. Collins 32 *Iowa* 36.

Rice Cr. Ev. Sec. 358.

Wiggins vs. Utah, 93 *U.* S. 465.

White vs Territory 4 *Wash. Ter.* 397.

State vs. Ingold 49 *N. C.* 216.

Phillips vs. Com. 2 *Duv.* 328.

Tweedy vs State 5 *Iowa* 433.

Com. vs. Selfridge H and T Self Defence 1.

The next objection to the court's charge is found in the 17th assignment, where the court comments on the improbability of the defendant's testifying truly. His charge on this point is an argument to the jury that the defendant should not be believed, thus practically nullifying the law which gives a defendant the right to testify in his own behalf.

The court says: "He makes his statement surrounded by self-interest, and consequently *you may presume* that what he says is prompted by motive on his part," and further the court says to the jury: "I doubt not that that there is a man living or a man that is purly mortal that was ever created who could resist the temptation to so protect himself when so situated. Human nature is of that character."

In the case of Wolen vs Whiteacre, 91 Ind. 532, it was said by Hammond, J.:

"The decissions of this court are numerous to the effect that it is error for the court to say or intimate to the jury that any circumstance or fact should be considered by them to the disparagement of a witnesses' testimony." And the rule above indicated in Finch vs Berdins 89 Ind. 360, is supported by Nelson vs. Vorce 55 Ind, 455; Garfield vs

State 74 Ind. 60; Rice Cr. Ev. p 183, Section 135.

The last objection which it is thought necessary to notice is found in assignment 19, which is an argument that if a man flies it is evidence of his guilt.

Flight may be very strong evidence of guilt, or it may weigh nothing, according to the circumstances under which it takes place."

Rice Cr. Ev. p 29.

Flight is but a circumstance to be considered by the jury —not evidence of guilt. And, where the killing is not denied, as in the case at bar, it is but a slight circumstance, which neither tends to prove, or disprove the guilt of the accused.

9 Am. and Eng. En.-L. 692.

People vs. Grancoli, 74 Cal. 642.

The many errors being considered in the light of the foregoing reasons, we fell confident that the judgment against the plaintiff in error should be reversed and a new trial be granted.

Respectfully submitted,

A. H. GARLAND,

Attorney for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
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In the Supreme Court of the United States.

OCTOBER TERM, 1893.

ROBERT MARSHALL HALL, PLAINTIFF in error,
v.
THE UNITED STATES.
No. 822.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

The plaintiff in error was indicted by the name of Robert Marshall, the name he went by, for the murder of James Yates, a white man, on August 4, 1891, at a disreputable locality called Chippy Hill, in the town of McAlester, in the Choctaw Nation. The prisoner pleaded not guilty by the name of Robert Marshall Hall.

STATEMENT OF FACTS.

The testimony on the trial was rather conflicting and the witnesses were all of the class known as "toughs."

It was admitted that Hall, then a young man of 20, had killed a negro in the State of Mississippi, where his father lived, and had fled to the Indian Territory to avoid resulting difficulties. His own claim was that he fled by advice of his father, as his life was in danger from the friends of the man he had killed. It was admitted that, after the killing of Yates, he was tried in Mississippi and acquitted of murder there.

It was also undisputed at the trial that the prisoner had a violent altercation with Yates on the evening of the latter's death, in which he was badly used by Yates, and that Yates' death later in the night was at his hand.

The prosecution claimed that after the first fight with Yates the prisoner said he was going to kill him that night, made careful preparation for flight after the murder, shot him several times without Yates firing a single shot, and after the affray was over emptied the murdered man's pockets.

The defendant claimed (and part of the story was based on statements of one of prosecution's witnesses, who, however, was accused of having been tampered with) that Yates had deliberately inveigled Hall into a game of cards, knowing that Hall had a considerable sum of money with him, and offering others that if they would assist in enabling Yates to get the money he would give them a commission out of it; that in the resulting game of poker Yates cheated flagrantly; that when Hall, during

the game, after complaining of the cheating, put his hand under the table, Yates, knowing that Hall had hidden a knife in his shoe for protection, pulled a pistol on him, and in the resulting scuffle Hall was badly used and subjected to most insulting language; that after Hall had left, some Indians coming to the resort, Yates pulled one of them off his horse and then explained by saying that he thought it was Hall; that Hall, being assured of Yates's departure, came back to the place to find a pocket-book which he had lost containing a bill of lading for $200 worth of goods; that he was met in front of the house by Yates, who fired several times before Hall returned the fire.

Hall immediately fled the country, but was returned by the authorities in Mississippi after his acquittal there.

ARGUMENT.

Many of the assignments of error need no attention. They disregard some of the well-settled rules of practice, as that—

No objection is available, unless exception was taken at the time of the adverse ruling (*United States* v. *Breitling*, 20 How., 252, 254; *Poole* v. *Fleeger*, 11 Pet., 185, 212 *Walton* v. *United States*, 9 Wheat., 651; *Scott* v. *Lloyd*, 9 Pet., 418, 442; *Hutchins* v. *King*, 1 Wall., 53, 60; *Stanton* v. *Embrey*, 93 U. S., 548, 555; *Alexander* v. *United States*, 138 U. S., 353, 355).

Objections to questions are not available on appeal if the questions stand in the record as unanswered (*Lovell* v. *Davis*, 101 U. S., 541);

Or answered adversely to the interrogating party (*Nailor* v. *Williams*, 8 Wall., 107).

An exception taken wholesale to a series of propositions in a charge is unavailable if any one of the propositions is correct. (*Johnston* v. *Jones*, 1 Black, 209, 220; *Rogers* v. *The Marshal*, 1 Wall., 644, 654; *First Unitarian Society* v. *Faulkner*, 91 U. S., 415; *Beaver* v. *Taylor*, 93 U. S., 46, 54; *Railroad Co.* v. *Varnell*, 98 U. S., 479, 483; *Mobile R. R. Co.* v. *Jurey*, 111 U. S., 584, 596.) The principle is the same as when the whole charge is excepted to, as in *Lincoln* v. *Claflin*, 7 Wall., 132, 139; *Lucas* v. *Brooks*, 18 Wall., 436, 456; *Cooper* v. *Schlesinger*, 111 U. S., 148; *Van Stone* v. *Stillwell Co.*, 142 U. S., 128, 135; *Chateaugay Co.* v. *Blake*, 144 U. S., 476, 488; or when the refusal of a request containing several propositions is excepted to wholesale, as in *Harvey* v. *Tyler*, 2 Wall., 328, 339; *Indianapolis R. R.* v. *Horst*, 93 U. S., 291, 295; *United States* v. *Hough*, 103 U. S., 71; *Moulor* v. *American Life Ins. Co.*, 111 U. S., 335, 337, 338. When the charge is ambiguous, additional instructions should be asked (*Pennock* v. *Dialogue*, 2 Pet., 1, 15; *Ins. Co.* v. *Munson*, 14 Wall., 442; *Spring Co.* v. *Edgar*, 990, U. S., 645, 659.)

The present record and the other records which have come up at the same time from the western district of Arkansas are in a form always condemned by this court (*Johnston* v. *Jones*, 1 Black, 209, 220, and cases cited; *Lincoln* v. *Claflin*, 7 Wall., 132, 137; *United States* v. *Rindskopf*, 105 U. S., 418; *Phœnix Insurance Co.* v. *Raddin*, 120 U. S., 183, 193). They clearly show the value of

the rule that requires all objections to the charge of the court to be made perfectly clear and specific by counsel. The instructions to the jury in these cases are very long, philosophical, and involved. It is difficult on a general exception to any paragraph to guess just what counsel really objected to and what he admitted to be correct. In most cases it must have been impossible for the court at the time to understand what the objection was. It is to be presumed that if the court, in giving the instructions, fell into any erroneous exaggeration of language or overlooked any essential element of the case, he would, on having his attention called to the fault by a proper exception, have corrected any misapprehension in the minds of the jury; and if anything was then left to be explained, proper requests for instructions should have been submitted. If exceptions of this character were permitted to instructions of this length, hardly a conviction would survive a critical review.

It will be noticed that in some places instead of an exception there appear the words "I will save the point." This ambiguous phrase is evidently not, however, as might perhaps be supposed, the recognized form of exception by the local practice; for in other places exceptions are noted in the regular way. Whatever may be the force of the phrase, as indicating that an objection taken is not waived as against future evidence of the same nature, and whatever weight may be allowed to it upon a motion for a new trial, it is respectfully submitted that it raises no question for this court, which considers only exceptions duly taken and presented in the form of bills of exceptions. It is the duty of counsel and the court, in prepar-

ing bills of exceptions, to make every exception duly taken plainly and affirmatively to appear, for nothing can be presumed against the verdict. If this is not done the exception, if any were intended, is presumed to have been waived. (*Scott* v. *Lloyd*, 9 Pet., 418, 442.)

In most respects this so-called bill of exceptions, — a mere transcript, almost *verbatim*, of the entire minutes, with all the remarks of court and counsel, personal explanations, digressions and byplay, -- is a duplicate of that discussed by the court, speaking through Mr. Justice Gray, in *Hanna* v. *Maas* (122 U. S., 24), which was held no bill of exceptions at all.

The assignments of error will now be considered separately in their order.

FIRST.

Denial of motion to postpone the trial so as to issue a *subpœna* for an alleged material witness. It appeared that defendant had applied previously and obtained a *subpœna*, then stating her residence as South McAlester, Ind. T.; that the *subpœna* had been returned "not found" August 1; that he did not again apply till August 13, when the case was called for trial, then stating her address as Coalgate, Choctaw Nation; that while the postponement was denied, the *subpœna* was issued, with the result that she was found to have gone to Texas; that the trial continued until August 17.

The assignment is unavailable, because—

(1) No exception was taken.

(2) Denial of a motion to postpone is not subject of exception. (*Woods* v. *Young*, 4 Cranch, 237; *Sims* v. *Hundley*,

6 How., 1; *Thompson* v. *Selden*, 20 How., 194, 198; *McFaul* v. *Ramsey*, *id.*, 523; *Cook* v. *Burnley*, 11 Wall., 659, 672; *Crumpton* v. *United States*, 138 U. S. R., 361, 364.)

"All questions as to surprise * * *" are "matters of discretion, not reviewable here." (*Ames* v. *Quimby*, 106 U. S. R., 342, 346.)

It is respectfully submitted that, as the ruling on such a motion is not subject of exception, it can not be reviewed by this court, even in case of abuse of discretion, for lack of any means of getting cognizance of the error, notwithstanding the less pronounced statement of the rule in *Means* v. *Bank of Randall* (146 U. S. R., 620, 629).

(3) But the discretion was wisely exercised in this case (Record, pp. 218–219).

SECOND.

This objection (p. 67) is made to the reception of a copy of a paper introduced to show that Hall was arrested as a fugitive from justice in Mississippi and sent back from there to Arkansas to answer for the killing of Yates. The grounds of objection were not pointed out, so that the point is untenable (*Noonan* v. *Caledonia Mining Co.*, 121 U. S., 393, 400); but the paper was totally irrelevant and harmless in any view of the case, and it was admitted that the prisoner had fled to Mississippi and been returned from there (pp. 151–153).

THIRD AND FOURTH.

Two of the questions objected to here were unanswered. The other was not objected to till after answer, and the an-

swer was favorable to defendant (p. 93). The points involved in the objections are discussed under the eighth assignment.

FIFTH AND SIXTH.

No exceptions (pp. 119, 125).

SEVENTH.

Question unanswered (pp. 129–130).

EIGHTH.

This objection (p. 169) raises the question whether the prosecution could contradict a witness subpœnaed and sworn, but not examined, by the Government, and put on the stand on behalf of the prisoner.

George Perry, the witness in question, was one of those named on the back of the indictment. He was accordingly and properly produced at the trial and was even sworn on behalf of the Government. It appeared, however (p. 63), that he had acted as a go-between in obtaining an interview between the prisoner's counsel and one of the other Government witnesses, a man, who, when on the stand, gave some testimony quite favorable to the prisoner. The district attorney not having called on Perry to testify, he was put on the stand by the prisoner's counsel after consultation with the court concerning the legal effect of this course (pp. 69, 70). The court stated the rule as follows:

> Where parties are subpœnaed by one side, the other may call them and cross-examine them, but the party who may have had him subpœnaed and sworn in

> court is not excluded from impeaching him. He does not make him his witness thus far, but he makes him his witness far enough that you may cross-examine him. * * * You may cross-examine the witness and the other side may impeach him if they see proper.

The witness then testified strongly in favor of defendant. He was then asked by the district attorney whether he had not made statements before the trial contrary to his testimony and contradicting as well defendant's version of the case, namely, that he saw defendant shoot and kill the deceased and afterwards walk up to him, get astraddle of him and rob him of his pistol and of his money. These questions the witness answered in the negative (p. 94).

In rebuttal, one Byrum Colbert was called by the district attorney (p. 169) and asked what, if anything, Perry had said to him about the killing of Yates. An objection was made on the ground that the prosecution could not contradict its own witness. It was overruled by the court. Witness answered, among other things:

> He spoke about some man, Marshall, that done the killing. He said he had shot Yates down and kept his pistol and some money.

The objection is evidently based upon some early cases holding that the prosecution was bound to put on the stand every witness to the alleged crime, whether favorable or unfavorable; that the prosecution's attorney could be forced to do this by the court; that if he did not do it, the court itself would put the witness on the stand, so that the defense might cross-examine him. These cases

are set out and discussed at considerable length in *State* v. *Cain* (20 W. Va., 679, 686–693). As remarked by the court in that case, the rule probably grew out of the fact that in early times in England the prisoner was not allowed counsel. This early rule, however, was changed in England, apparently by a conference of the judges, prior to *Reg.* v. *Woodhead* (2 Car. & Kir., 519), tried in 1847, in which Anderson, B., said:

> You are aware, I presume, of the rule which the judges have lately laid down, that a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment. The witnesses, however, should be here, because the prisoner might otherwise be misled; he might, from their names being on the bill, have relied on your bringing them here, and have neglected to bring them himself. You ought, therefore, to have them in court, but they are to be called by the party who wants their evidence. This is the only sensible rule.

Counsel for the prisoner asking: "Am I to understand, my lord, that if I call them I make them my own witnesses?" Alderson, B., replied:

> Yes, certainly; that is the proper course, and one which is consistent with other rules of practice. For instance, if they were called by the prosecutor, *it might be contended that he ought not to give evidence to show them unworthy of credit*, however falsely the witnesses might have deposed.

A similar ruling was made, citing other unreported cases, by Parke, B., in *Reg.* v. *Cassidy* (1 F. & F., 79), and the same rule is given by Roscoe, followed by Wharton. (Wharton's Criminal Evidence, § 448.)

In *Bressler* v. *People* (117 Ill., 422, 437), Scholfield, J., says:

> Under our practice the People are not compelled to introduce all the witnesses whose names are on the back of the indictment. If they fail to do so, and the defendant introduces a witness whose name is thus indorsed, he becomes his witness. And this is the modern English rule.

NINTH AND TENTH.

These assignments raise the same question as the eighth (pp. 180, 181).

ELEVENTH.

The district attorney was allowed by the court, in face of the prisoner's objection, to use the following language to the jury (p. 181):

> "We know what kind of trials they have in the State of Mississippi of a white man for killing a negro. We know from reading the newspapers and magazines that such trials there are farces. We are not living in Egyptian darkness, but in the light of the nineteenth century. The defendant came from Mississippi with his hands stained with the blood of a nigger and went to the Indian country, and in less than four months had slain another man," and other like expressions and declarations that the killing of a negro in Mississippi for which the defendant had been tried and acquitted there was murder.

Defendant had testified that he had killed a negro in Mississippi, but had been acquitted (p. 151).

The court's reasons for allowing the district attorney to proceed are stated in its opinion on the motion for a new

trial at pages 219–221. The court held that it could take judicial notice of the fact or supposed fact that trials of white men in Mississippi for killing negroes are farces, and that counsel could properly allude to any historical fact or facts "generally recognized by everybody." The court states that defendant's counsel, in objecting to the remarks, admitted their historical character.

(1) Upon an exception to a ruling on a motion to check argument of counsel, the right of review is to be exercised but cautiously, when there is an abuse of discretion, and when it is probable that the jury have been misled. (1 Thompson on Trials, § 964, and cases cited.)

It is now settled in this court (*Wilson* v. *United States*, 149 U. S. R., 60, 67, 68), in accordance with the general, though not universal, rule elsewhere, that such an exception lies. But the court has recognized that by opening the gate wide to such appeals "a new element of uncertainty would be introduced into the administration of justice in a criminal case." (*Hopt* v. *Utah*, 120 U. S. R., 430, 442).

In Texas it is settled that the exception will not be noticed except when the court has subsequently refused to instruct the jury to disregard the improper remarks. (*Young* v. *State*, 19 Tex., App. 536; *Comer* v. *State*, 20 S. W. Rep., 547.)

The supreme court of Pennsylvania, in the recent case of *Commonwealth* v. *Nicely*, speaking by Mr. Chief Justice Paxson, said:

> I am not aware of any way by which the speeches of counsel can legally be placed on record, nor do I

> well see how the judgment of the court could be reversed by reason of their remarks. I would regard any system of practice by which error could be assigned to the summing up of counsel as a very great calamity.

See also *Thompson* v. *Barkley*, 27 Pa. St., 263; *State* v. *Hamilton*, 55 Mo., 520, 522.

The fears so expressed have become realized in the States like Missouri (*State* v. *Brooks*, 92 Mo., 542, 589), Indiana, and Texas, where the practice of objecting and excepting to arguments of counsel has gained a foothold and become familiar. It has become a great annoyance to courts and suitors. There is no doubt that the court at nisi prius has the right to check excesses of counsel in summing up, and that it ought to exercise that right. Probably the right should be exercised more liberally than it is at present; but to encourage appeal except in very strong cases would not only delay justice and overburden appellate courts, but turn the summing up in criminal cases into a continual wrangle. Plenty of instances may be found in recent numbers of the Monthly Digest of American Current Decisions; see, for instance, *People* v. *Kahler*, 93 Mich., 625, where a conviction was reversed for such remarks as: "I don't know that a man who drinks is any more to be believed than the man who sells the liquor."

The supreme court of Indiana, a State in which such appeals are common, in *Combs* v. *The State* (75 Ind., 215, 219, 220), referring to a remark of the prosecution's attorney in a murder case, that "three or four men have been re-

cently executed at Indianapolis, most of whom set up the plea of insanity," used the following language:

> Courts ought not to reverse cases, because counsel in the heat of argument sometimes make extravagant statements or wander a little way outside of the record. If a matter of great materiality is brought into the record as a matter of extended comment, then there would be reason for setting aside the verdict. If every immaterial assertion or statement which creeps into an argument were to be held ground for reversal, courts would be so much occupied in criticising the addresses of advocates as to have little time for anything else. Common fairness requires that courts should ascribe to jurors ordinary intelligence, and not disregard their verdicts because counsel, during the argument, may have made some general statements not supported by evidence. * * * The conduct of the argument is a matter much within the discretion of the trial court, and it is only where threre is an abuse of discretion that appellate courts will interfere. * * * It is not always easy to correctly draw the line between what is proper and what is improper. Matters of common general public information may sometimes be properly referred to, and matters of opinion and settled history may often be commented upon with entire propriety. But matters of a local nature, or matters not of common and public notoriety, are not properly the subject of comment. To rigidly require counsel to confine themselves directly to the evidence would be a delicate task, both for the trial and appellate courts, and it is far better to commit something to the discretion of the trial court, etc.

In *Shular* v. *The State* (105 Ind., 289, 302–304), the court again discussed the same question, citing intermediate cases, and coming to the conclusion that—

> The trial court should promptly check any departure from fair debate, and if the departure is a grave one, sternly rebuke, or, if need be, punish the counsel. But it does not follow from this that in every instance where there is a transgression of rules that govern in the argument of causes there should be a reversal. As the cases to which we have referred decide, the appellate court can only interfere where substantial injury has been done the party; but the trial court may and should always keep counsel within the bounds of legitimate argument. If counsel undertake to state matters not in evidence, or to state facts which could not be put in evidence, the trial court should restrain them by a quick and sharp rebuke; but the omission of the trial court to do its duty, while it may be a just reason for criticism, will not always entitle the accused to a judgment annulling the verdict.

In *State* v. *McGahey*, 55 N. W. Rep., 753, 756, 757 (North Dakota, July, 1893), Bartholomew, C. J., approving *Combs* v. *State*, *supra*, said:

> The cases will be found to fall almost without exception into one of three classes. By far the largest class are cases where counsel have violated some express statutory provision, such as referring in argument to the jury to the fact that a defendant in a criminal case failed to be sworn as a witness, or by referring on a second trial to the fact of a former conviction. In these cases a reversal is, of course, imperative. In other cases counsel have stated to the jury as facts in counsel's own knowledge matters

> prejudicial to the defendant, but immaterial to the issue on trial, and which could not properly be given in evidence; or have sought to augment the force of the evidence by their own positive but unsworn assertion of a pertinent and material matter. Another class of cases comprise the instances where counsel in argument have assumed certain facts to be proven of which there was no evidence whatever.

It is believed that, while perhaps the learned judge understates the number of decisions not conforming to his rules, the rules stated are as liberal as propriety will allow.

In *Cross* v. *State* (68 Ala., 476, 484), the court said:

> Such statements are usually valued at their true worth and have no tendency to mislead. It is only when the statement is of a substantive, outside fact—stated as fact—and which manifestly bears on a material inquiry before the jury, that the court can interfere and arrest discussion.

See also *Scripps* v. *Reilly*, 35 Mich., 371; *Pierson* v. *The State*, 18 Tex. App., 524.

(2) The district attorney, in commenting on the method of trial in the State of Mississippi, did not profess to inform the jury as to any fact, but to remind them of what he considered a matter of current notoriety through newspapers and magazines. The remarks were of a kind familiar to every summing up in a criminal case. The jury can hardly have estimated them at more than their true value. The case is somewhat similar to that of the *State* v. *Stark* (72 Mo., 37), where counsel stated that "defendant had gone to the Indian Territory, where all rascals go." The court on appeal said: "Defendant in

his own testimony states that he went there. The additional words 'where all rascals go,' whether true or false, could certainly have had no effect upon the jury."

(3) The exception, however, is not specifically directed against the remark of the district attorney concerning the method of trials in Mississippi. It is a general exception directed to four sentences, and if any of these sentences contain correct propositions, the exception is valueless according to authorities already cited. The last proposition that "defendant came from Mississippi with hand stained with the blood of a negro," etc., was true and proper enough for the district attorney to include in his summing up, whether defendant, when he killed the negro, was guilty of murder or manslaughter, or was justified by the right of self-defense. The fact that he had been engaged in such broils is one which the jury cannot possibly have overlooked in considering his true character as developed on this trial.

TWELFTH.

In the course of his charge to the jury on the subject of malice, the judge used the following language (pp. 192–193):

> The only method of protection outside of resorting to circumstantial evidence in every case where a human life has been taken is by the shot-gun and Winchester and the pistol, because you can not get at this essential element of the crime of murder by any other means than by the light of circumstantial evidence, and if you ignore it, if you disregard it, there is no enforcement of the law. We are powerless, and we are

> in anarchy; we are at the mercy of the lawless, the desperate, and the wicked, and they are our autocrats, our rulers. We must depend upon this character of evidence. The law authorizes us to depend upon it, because it says whatever is legal evidence may be sufficient evidence, provided there is enough of it to establish the facts in the case, and this circumstantial evidence is legal evidence, and we are therefore to look to it and look at the case by the light of this sort of evidence.

The court was not informed wherein these observations were deemed objectionable. Certainly they include a number of correct propositions.

THIRTEENTH.

Further charging the jury the judge used the following language (pp. 196–97):

> The other condition that we have named is that of self-defense, which gives the right to kill—to take human life. It is that condition which the law says from necessity the individual is put in an attitude of not only being judge of the law, but of being executioner of it, and practically and really at the time he is acting as judge and jury and executioner all at the same time. He is judge of what the law says, though not sworn to do so. He finds what the facts are, though not sworn to try the case according to the law and the evidence. He makes an application of the law to the facts and he finds a verdict and he enters up a judgment and then and there, all at the same time, executes that judgment and takes a human life. Now, that he may be permitted to discharge that responsibility, or that condition

> of thing that rests upon him properly, his conduct must be viewed in the light of the law giving him the right to act in this double capacity. In other words, he is not to use this law as a shield or covering for a state of case that does not come within it. If the case comes within it he is entitled to the provisions of the law for his protection. If the case is outside of it by the terms of the law, then he can not stretch it in order to cover his case. He must stand within the purview of the law or he can not be benefited by it.

The only possible criticism that can be made upon this paragraph is that it implies more opportunity of deliberation that a man has who is being shot at. It was for defendant's counsel to point out this implication, if they feared it, and to ask such explanatory directions as they might think desirable. (*First Unitarian Soc.* v. *Faulkner*, 91 U. S., 415, 423; *Spring Co.* v. *Edgar*, 99 U. S. 645, 659). But the jury can not possibly have been misled in this regard, especially in view of the court's farther remarks quoted under the next assignment, and the correct definition of self-defense given on page 198.

But the whole matter was made immaterial by the verdict. For the judge had instructed the jury that if the defendant unlawfully and wilfully, but without malice, had killed another, the act would be not murder, but manslaughter (pp. 194–196). When he proceeded to discuss whether the defendant had brought himself within the justification of self-defense, he was discussing whether the jury were to acquit or to convict of manslaughter. The verdict of murder, accordingly, showed that the jury

did not believe the evidence as to self-defense at all, and that they therefore could not have been affected by the charge in this particular.

And the passage certainly contains some correct propositions.

FOURTEENTH.

Also the following language (p. 197):

> But the man who acts so as to take human life—to do that thing which is the most serious thing of all others, and it entails the most serious effects upon society if it is done wrongfully—the man who, I say, is so situated when deliberating the law applicable to him and to the facts of that case, and in making an application of the law to them and in finding a verdict and in entering a judgment on the death of the man before it could be written out and promulgated or proclaimed, *the man is in a condition of mind different to yourselves.* You are the arbiters as to whether he had a right to invoke the law of self-defense.

It seems unnecessary to add anything further, except to note that the court here recognizes the fact that defendant can not be treated as if he had opportunity for calm deliberation.

FIFTEENTH.

Also the following language (p. 198):

> Now, this phrase commanding him to retreat as far as he can, contemplates that he should avoid the difficulty. If he is away from where the danger is, although it may exist, if it has an existence, and he is out of the way of it; his duty is to keep out of the

reach of it; his duty is to keep away from it and not to hunt it up, not to seek it. If his adversary is at a place, and he knows if he goes there there will be danger to his life, his duty is to avoid that place, although, as a general proposition of the law, he has a right to do what the law permits him to do. In this case, as an abstract proposition, the defendant had a right to hunt for this book if it is true that he had lost his book there; *but if he knew there was deadly danger there, if he knew there was a probability of getting into an affray there with his adversary, with whom he had had a difficulty, it was his duty to keep away from there at that time*, and under such circumstances he would have had no right to go there, even to hunt for his pocketbook, because, I say, a higher duty as affecting him would spring into existence, the higher duty as affecting him from the standpoint of self-interest, self-protection; if he contemplated there was deadly danger there, or danger of a difficulty, the duty to himself commanded him to avoid that condition because he might lose his own life in it; self-duty commanded him to abstain from it, and it is his duty to his adversary and to the public to do so in such a case. We are all vitally interested in the protection of human life. It is a public injury that is sought to be redressed; it is a public crime that is to be correctly defined and correctly pronounced by the jury, and it is not to be pronounced in any bending or cringing way to suit the circumstances, because the man killed may not have squared his life with the rules of uprightness or morality, but it is to be pronounced in exact accordance with the mandate of the law.

The last proposition is certainly correct. The balance relates to the plea of self-defense, which is immaterial, as

shown under Thirteenth, *supra*. If the jury had believed the evidence of self-defense, and yet been misled by the court into too narrow a view of defendant's rights in this particular, they would have found a verdict of manslaughter under the charge. (See also eighteenth, *infra*, as to relevancy of charge.)

SIXTEENTH.

Also the following language (p. 201) in discussing the case of a man going to a place with a deadly weapon to provoke a difficulty or get up an affray:

> Now, when that state of case exists it not only shows a state of case as I have already told you that is murder, but it shows one from which is entirely banished the law of self-defense, and there is no law of self-defense in it. No matter what the adversary slain may do, when a party goes to the place where the slain person is *with a deadly weapon for the purpose of provoking a difficulty, or with intent of having an affray*, because this law of self-defense commands a man to avoid the deadly danger if it is existing, whenever he can do it with due regard to his own safety, and *if he arms himself with a deadly weapon and goes to the place for the purpose of using that deadly weapon or with the purpose of having an affray when he gets there if opportunity offers when he can use* it, instead of seeking to avoid the necessity of taking life, he is creating a state of case where he can not take human life by an act of violence if occasion offers, and *the law banishes from him the right of self-defense, no matter what the adversary may do in the affray generated by his act.*

That is, if the defendant was in search of a shooting affray, it is immaterial whether he or his proposed victim fired the first shot. The self-defense is on the other side. This is familiar law. (2 Bishop Criminal Law, § 701–2, 715–6; *State* v. *Murdy*, 81 Iowa, 603, 614.)

In *U. S.* v. *Mingo*, 2 Curt. 1, Mr. Justice Curtis charged the jury as follows:

> You will say whether it is made out beyond a reasonable doubt that it was a mutual combat in which both engaged willingly. If so, it is manslaughter. If the defendant entered into the combat willingly, he can not say that he killed his adversary in self-defense.

(See also *State* v. *White*, 66 Mo., 138, 146; *State* v. *Gilmore*, 95 Mo., 554, 560; *Allen* v. *Commonwealth*, 86 Ky., 642, 648; *Rex* v. *Thomas*, 7 C. & P. 817).

> The combat must not have been of his own seeking, and he must not have put himself in the way of being assaulted, in order that when assaulted and hard pressed he might take the life of his assailant. (Thurman, J., in *Stewart* v. *State*, 1 Ohio St., 66, 72.)

In Vaiden's case, 12 Gratt., 717, 730, the prisoner and deceased had had a fracas in the former's house. They had been separated by the former's wife, and the latter had taken his gun and started for home. The prisoner, without any good reason, took his own gun and followed him to the gate, where he was attacked by deceased, and shot him in self-defense. A verdict of manslaughter was sustained.

Care is of course to be had in using decisions of those States which divide up murder and manslaughter into

various degrees. *State* v. *Gilmore*, above cited, is an instance where the phrase "there is no self-defense in the case" is criticised, but the criticism is on the ground that there was enough self-defense in the case to reduce the crime to manslaughter in the fourth degree, whereas the prisoner had been convicted of murder in the second degree.

SEVENTEENTH.

Also the following language (pp. 209, 210):

> The defendant goes on the stand. He makes statements before you under oath. They are to be viewed in the light of the other facts in the case. If the other evidence that is truthful corroborates what he says you have a right to consider his evidence as strengthened by evidence of that character, but if the other evidence that is true contradicts what he says, it is your duty to consider his evidence weakened, just as you may attach credit to the contradictory facts. He makes his statement surrounded by self-interest, and consequently you may presume that what he says is prompted by motive upon his part. He stands before you having the strongest motive that a man can ever have in this life, to make statements favorable to himself, the strongest motive that any of us can have, and I doubt not that there is a man living or a man that is purely mortal that was ever created who could resist the temptation to so act so as to protect himself when so situated. Human nature is of that character.

The objection that the judge cannot comment upon questions of fact, such as the credit to be given to particular witnesses, is not tenable in the Federal courts.

It is certainly a correct proposition that defendant's statements are to be viewed in the light of the other facts in the case.

EIGHTEENTH.

Also the following language (p. 211):

> There is another proposition that is important to dwell upon in this case, and that is in reference to the defendant going back to the place of the killing.
>
> I have already adverted to that. I have already told you that *if he armed himself and went back there for the purpose of hunting Yates, and having an affray with him, prepared to take his life, or to engage in a deadly encounter, that then there was no self-defense.* That if he knew there was deadly danger there, if he had reason to believe that Yates was there, and if he armed himself after two hours had passed and went back there for the purpose of getting his pocketbook, it was a mission that he would have no right to perform at the time, although in the abstract and in a peaceful condition he would have a perfect right to go there for the purpose of getting his book. But if he had reason to believe that that would bring about a deadly conflict or deadly act of violence to be done by Yates upon him it was his duty to avoid any search for that book at that time, to keep away from there, because the fact of going after the book was not a matter of such importance as to cause him to risk his life, or the life of anybody else that might be destroyed in an affray that ensued because he went to the place, *and he could not set up the idea that he went there for that, provided he went there armed for a deadly conflict, and had reason to believe that a conflict might ensue because he might meet Yates there. If he had reason to believe*

> *that nothing of that kind would ensue*, that everything was peaceful, everything was quiet, *then he would have a right to go there* to get his book, if that was what took him there.

Certainly the portion about hunting Yates to have an affray with him is correct (Sixteenth, *supra*). This assignment bears only on the question of manslaughter in unjustifiable self-defense. (Nineteenth and fifteenth, *supra*.)

There was no evidence that he went for a book believing Yates was still there. The prosecution's witness swore that he went expressly for the purpose of killing Yates (pp. 11, 26–8, 69), while he testified that he went only on learning that Yates had ridden away (p. 148). The court's remarks about looking for a pocketbook in a dangerous place were founded on a misapprehension, to which his attention was not called by defendant's counsel.

NINETEENTH.

Also the following language (pp. 212–213):

> Now the law contemplates that we all have a certain kind of human nature which is largely made up of a desire to protect ourselves. If we are in the right when we kill a man, generally speaking, we are prompted from self interest, from our own desire to appear well with our fellow-men, to seek a vindication at once; to go, not where mobs may hang us or destroy our lives, but where honest and peaceful, and law-abiding, and law-loving citizens may pass upon our case as jurymen and vindicate us before the world, saying we were right in doing what we did do. That is human nature. It don't make any difference how much a man may be steeped in sin or how bad he may be, there is that still monitor in his heart or

> his mind that he cannot silence. It is called his conscience. It is given to him to teach him the difference between right and wrong. When he is in the right it tells him so, and he consequently seeks to have other men to believe as he knows to be the case, and when he is in the wrong his conscience reproves him and reprimands him; and it is upon this principle that the law says to the jury that when a man has taken human life and flies from the jurisdiction that may try him—that may vindicate him if innocent or punish him if guilty—that that flight is evidence of guilt, unless he explains it in a satisfactory way. That is what the law says. It contemplates that if he flies he does so because he does not want a vindication. Therefore the law says that if he goes out of the jurisdiction, or hides within the jurisdiction so he can not be readily arrested, he becomes a fugitive from justice.

The exception here is evidently intended to raise the point that the jury were led to believe flight conclusive on the question of guilt, unless affirmatively explained away to their satisfaction. But the exception is not directed to the point with sufficient clearness. It is proper to charge that flight is "evidence of guilt" (*Ryan* v. *People*, 79 N. Y., 593, and other cases cited *infra*). If there was danger of the jury's believing the last sentences to refer to a presumption of law binding upon them, a specific exception should have been taken or instructions asked. The court would then doubtless have drawn the distinctions more clearly to the jury. Flight is a circumstance to be taken into serious consideration. (2 Thompson on Trials, § 2543, and cases cited; Lawson on Presumptive Evidence, p. 537; *Comm.* v. *McMahon*, 145 Pa. St.,

413; *State* v. *Fitzgerald*, 63 Iowa, 268.) The ancient maxium was: *Quia fatetur facinus qui judicium fugit.* (*Foster's Case*, 11 Co., 60 *b.*) It is no longer put so strongly, but the jury is to consider the fact of flight in connection with the other *res gestae*. (*Ryan* v. *People*, 79 N. Y., 593; Wharton, Crim. Ev., § 750; *People* v. *Stanley*, 47 Cal., 113, 118.) The immediately succeeding sentences in the charge show that the jury were not asked to do more than this.

The first proposition of the learned court in the paragraph here excepted to is certainly correct.

TWENTIETH.

Denial of a motion for a new trial is not assignable error. (*Henderson* v. *Moore*, 5 Cranch, 11; *Marine Ins. Co* v. *Young*, Id., 187; *Marine Ins. Co.* v. *Hodgson*, 6 Cranch, 206, 218; *Blunt* v. *Smith*, 7 Wheat., 248; *McLanahan* v. *Universal Ins. Co.*, 1 Pet., 183; *United States* v. *Buford*, 3 Pet., 32; *Brown* v. *Clarke*, 4 How., 4, 15; *Pomeroy's Lessee* v. *Bank of Indiana*, 1 Wall., 591, 597, 598; *Freeborn* v. *Smith*, 2 Wall., 160, 177; *Newcomb* v. *Wood*, 97 U. S., 581, 583, 584; *Railway Co.* v. *Heck*, 102 U. S., 120; *Hanna* v. *Maas*, 122 U. S., 24, 26; *Crumpton* v. *United States*, 138 U. S., 361, 365; *Wilson* v. *Everett*, 139 U. S., 616, 621, and other cases cited in 1 Indexed Dig. U. S. Sup. Ct. Rep. (Lawy. Co-op. Pub. Co.'s ed., pp. 146, 147.) "No authorities need be cited in support of the proposition." (*Van Stone* v. *Stillwell Co.*, 142 U. S., 128, 134.) It is "too plain for argument." (*Barr* v. *Gratz's Heirs*, 4 Wheat., 213, 220.) "Such a motion is

not a part of the proceedings in the cause. It is an application to the discretion of the court" (*United States* v. *Daniel*, 6 Wheat., 542, 548, *per* Marshall, C. J.), and for this reason was held not a proceeding a difference of opinion upon which could be certified under the act of April 29, 1802 (*Id.*).

TWENTY-FIRST.

After verdict the sentence in criminal law, like the judgment at common law (*Pomeroy's Lessee* v. *Bank of Indiana*, 1 Wall., 592, 598), follows as a matter of course, and therefore cannot be subject of a separate general exception.

It is respectfully submitted that the judgment should be affirmed.

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